Law Reform Commission

Costs Awards in Civil Litigation

2005

Manitoba Law Reform Commission

Manitoba

Law Reform Commission

Commission de réforme du droit

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CHAPTER 1

INTRODUCTION

A. BACKGROUND

In 1996, the Canadian Bar Association Task Force on Systems of Civil Justice recommended that every jurisdiction in Canada undertake a reassessment of the principles underlying existing costs rules.[1] In February of 2004, the Court of Queen's Bench Statutory Rules Committee invited the Commission to review the law relating to costs orders in civil proceedings.[2] The Commission agreed to do so and the result is this Report.

B. SCOPE OF REPORT

The cost of litigation has been increasing in Canada at a rate far outpacing the rate of inflation. Over the past 10 to 15 years, numerous studies, task forces and commissions have identified this increasing cost of litigation as a significant issue.[3] In addition, the courts have been reconsidering and redefining the purposes of their costs awards.

This Report considers the fundamental basis of the existing costs regime in Manitoba and compares it with the regimes in other jurisdictions. It then asks whether reform is necessary to ensure that the rules best achieve their purposes. As well, the Report reviews the common law rules relating to costs awards to self-represented litigants, which have been in flux in recent years, in order to determine whether a legislated regime with respect to such costs is desirable.

This Report does not seek to be comprehensive with respect to all issues relating to costs. Unlike a similar Report issued by the Australian Law Reform Commission in 1995, for example, it does not deal with the costs of administrative proceedings or criminal proceedings, costs indemnity schemes or the enforcement of costs orders.[4] Nor, unlike a recent discussion paper issued by the Alberta Law Reform Institute, does it delve into issues of taxation of costs,

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[1] *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (1996) at 46-47, online: <http://www.cba.org/CBA/cba_reports/pdf/systemscivil_ttreport.pdf> (date accessed: 13 March 2005).

[2] Memorandum from Mr. Justice G.O. Jewers, Chairperson, Statutory Rules Committee, Manitoba Court of Queen's Bench (23 February 2004).

[3] See, for example, *Manitoba Civil Justice Review Task Force Report* (1996); *Ontario Civil Justice Review: First Report* (1995), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/> (date accessed: 19 May 2005); British Columbia, *Access to Justice: The Report of the Justice Reform Committee* (1988); Alberta Summit on Justice, *Final Report* (1999), online: <http://www.justice.gov.ab.ca/publications/justicesummit/rec/final.htm> (date accessed: 13 March 2005); Canadian Bar Association, *Access to Affordable and Appropriate Law Related Services in 2020* (1999), online: <http://www.cba.org/CBA/cba_reports/WindsorPaper.pdf> (date accessed: 10 March 2005); and *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, *supra* n. 1.

[4] Australian Law Reform Commission, *Costs shifting – who pays for litigation?* (Report #75, 1995) at ¶2.18.

security for costs, protection for payment of lawyers' accounts or court fees.[5] Instead, in accordance with the invitation from the Statutory Rules Committee, it is restricted to the rules governing the award of costs in civil proceedings in the Court of Queen's Bench. In addition, except where specifically noted, the Report deals only with lawyers' fees, and not with disbursements (such as the cost of experts' reports, filing fees, photocopying costs, and the like).

C. ACKNOWLEDGEMENTS

The Commission wishes to thank Mr. Jonathan G. Penner, an independent researcher, for undertaking this project. As in the past, Mr. Penner's excellent research and writing skills provided the Commission with the background information necessary for us to reach our final conclusions. We also wish to thank Ms Blane Morgan who assisted Mr. Penner in the preparation of the final Report.

[5] Alberta Law Reform Institute, *Alberta Rules of Court Project: Costs and Sanctions* (Consultation Memorandum #12.17, 2005).

CHAPTER 2

PURPOSES OF COSTS

It is taken as axiomatic by lawyers practising in all Canadian jurisdictions that a party who succeeds in court can reasonably expect to have some or all of his or her legal costs defrayed by the unsuccessful party or parties. The precise mechanism by which this occurs, the proportion of those costs that is defrayed and the degree of latitude afforded to the court in making such an order of "costs" varies from jurisdiction to jurisdiction, but the basic principle is essentially unvarying.

A. CONFLICTING RATIONALES

Despite the ubiquitous nature of costs awards in Canada, however, their purpose is not always clearly articulated or understood. There are, in fact, several different rationales that are offered at different times and in different circumstances, some of which can be seen as contradictory. One author has suggested:

> Searching for the "philosophy" of costs is a challenging task. It is relatively easy to describe the different approaches used in various jurisdictions, but the reasons for those differences are elusive. Under close examination, it sometimes appears that there is no underlying philosophy, or that the philosophy may have changed without reason or explanation. Certain approaches to costs seem to have developed unconsciously or accidentally, as a product of certain extraneous factors, only to be later described and justified as reflecting a particular philosophical objective.[1]

The British Columbia Court of Appeal has noted that costs rules serve several different purposes:

> A review of the Rules reveals that party-and-party costs serve several functions. ... They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.[2]

The Canadian Bar Association Systems of Civil Justice Task Force eloquently described some of the conflicting goals of costs rules in its 1996 Report:

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[1] E.T. Spink, *Party and Party Costs* (unpublished paper, Alberta Law Reform Institute, 1995) at 1.

[2] *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 at 339 (B.C.C.A.).

> Several competing interests underlie costs rules, including fairness, compensation for legal injury, deterrence, the public interest in encouraging public law litigation and development of the law, an attempt to equalize or balance the relative positions of the parties, and economic incentives. In general, the tradeoff in Canada has been between fairness (which would fully compensate successful litigants for legal costs) and access (because costs can operate as a disincentive to pursue valid claims). While costs awards can encourage valid small claims (because they avoid the situation where the financial benefits of a successful law suit are absorbed by the cost of pursuing the suit), they can also discourage valid claims, because they increase the risk of pursuing litigation. Full indemnification can have the effect of deterring unmeritorious litigation and facilitating settlement. However, it can also deter meritorious claims, tend to favour the wealthy litigant over the less affluent litigant, and make settlement more difficult by increasing the stakes.[3]

An interesting perspective on the difficulties encountered in designing costs rules was set out in a 1984 article by an American scholar describing European costs rules:

> The history and present state of European rules on cost shifting, as well as recent proposals for their reform, reflect the dilemma, not unknown to Americans, posed by a variety of conflicting notions and attitudes:
>
> (1) Costs generally are viewed as blemishes. Ideally, courts should be fully accessible to everyone free of cost.
>
> (2) While the costs of maintaining and operating the courts themselves can, without too much difficulty, be absorbed by the government, attorneys – whose services are indispensable in most matters – must also be paid somehow, and shifting that burden to the government would create not only economic problems, but also problems with respect to attorneys' independence.
>
> (3) There must be safeguards to prevent the system of civil procedure from being abused by debtors whose only aim is to delay or avoid paying an undisputed obligation; by persons who pursue unfounded or exaggerated claims for personal gain, for harassment, or to satisfy a distorted view of justice; or finally by lawyers whose only objective is to generate fees.
>
> (4) It is difficult, if not impossible, to devise objective criteria for distinguishing between good faith litigation, which is to be encouraged, and bad faith litigation, which is to be discouraged.
>
> (5) If bad faith is not found and the costs cannot be shifted to the government, there are only the two parties between which they can be allocated.[4]

It is probably the case that there are two basic rationales that underpin costs rules of the type that exist in Manitoba: equity and incentives. It is generally considered fair that a party

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[3] *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (1996) at 46, online: <http://www.cba.org/CBA/cba_reports/pdf/systemscivil_tfreport.pdf> (date accessed: 13 March 2005).

[4] W. Pfennigstorf, "The European Experience with Attorney Fee Shifting" (1984) 47 Law & Contemp. Probs. 37 at 82-83.

that succeeds at trial should be "made whole," while a party who has either brought an unmeritorious action or defended an indefensible position should be forced to compensate the party who was thereby forced to respond. It is also generally felt that meritorious claims will be encouraged, and frivolous and vexatious litigation discouraged, by the prospect that at the end of the day the victorious party will have their legal fees borne, at least to some extent, by the loser.

B. DESIRABLE GOALS

The Commission considers that appropriate costs rules should accomplish all of the six following broad goals, to the greatest extent possible – recognizing that some of these goals are to some extent mutually incompatible.

1. Indemnification

First, the costs rules should provide successful litigants with at least partial indemnification of their legal costs. There is a prevailing opinion in Manitoba, and in most other jurisdictions, that it is only fair that a litigant who is vindicated should be "made whole," at least to some extent. Conversely, a litigant who is ultimately shown to have been "at fault" ought to be required to bear a greater proportion of the burden of establishing that fact than the successful party or parties.

To what *extent* a successful litigant should be indemnified is a matter of some debate and is discussed at greater length in Chapter 5. While there are arguments in favour of full indemnification, there are also counter-arguments, not the least of which is a concern that such a policy may encourage over-litigation by optimistic or opportunistic litigants.

In order to provide an appropriate level of indemnity, the rules should also reflect the *actual* costs of litigation and should not be subject to erosion as a result of inflation. Whatever level of indemnity is considered appropriate should thus be consistently maintained and responding to changes in the cost of legal services.

2. Deterrence

Costs rules should also deter frivolous actions and defences. People should be encouraged to think twice before engaging the civil justice system on behalf of a claim that is unmeritorious; and someone who is clearly liable to someone else should be discouraged from using the courts in an attempt to evade that liability.

Similarly, the rules should discourage improper or unnecessary steps in the litigation. They should encourage parties to comply with the court's rules and procedures, thus ensuring the

efficiency of the process, both for the particular litigants and for other users of the civil justice system. In achieving this goal, the rules should highlight for the parties the actual costs of litigation, thereby helping to achieve another of the Commission's goals, noted below: encouraging settlement. In doing so, they should incidentally help to achieve another important goal of Manitoba's civil justice system: reducing total litigation costs.

It can be seen already that the goals of indemnification and deterrence cannot both be fully achieved by the same set of rules and that some balancing will be necessary.

3. Simplicity and Clarity

The Commission also considers that costs rules should be easy to understand and simple to apply. They should provide clear guidance to both courts and litigants as to how the costs of proceedings will be apportioned, providing predictability at each stage of litigation. Calculating the amount of costs that will be payable should be a simple and workable process, both for lawyers and for unrepresented litigants. This is an important principle, key to the achievement of many of the other goals. Achieving it will also enable the achievement of another important goal which is reducing disputes over costs.

4. Encouragement of Settlement

A fair system of costs awards should also encourage reasonable settlements by providing financial incentives to settle at every stage of the litigation. This should include encouraging the use of appropriate dispute resolution processes: not every claim needs to go to trial, and the costs rules have a role to play in encouraging the consideration of mediation, arbitration, summary trials and other alternatives to trial.

5. Facilitation of Access to Justice

Costs rules should not inappropriately impede access to the courts, and should facilitate access to justice. Parties should not be dissuaded from bringing meritorious claims for fear that they may be bankrupted by an adverse decision.

Costs rules can also be used to equalize or balance the relative positions of parties. In the United States, many jurisdictions have introduced "one-way" costs rules that permit awards of costs in favour of plaintiffs bringing particular types of claims (such as civil rights claims), while not allowing costs awards in favour of defendants. Costs rules can be used in other ways as well to "level the playing field".

Costs rules thus have an important role to play in encouraging public law litigation and

the progressive development of the law.

6. Flexibility

Finally, the Commission considers that costs rules must leave sufficient discretion in the court to address exceptional circumstances. Despite the need for certainty, simplicity and predictability, it must be possible for judges to ensure that justice is done in particular cases.

C. BALANCING OF GOALS

The Commission recognizes, as discussed above, that there is inherent tension among the various goals it has identified: some can only be achieved by reducing the extent to which others are achieved. The simpler and clearer the rules are, for example, and the more predictable costs awards become, the less likely they are to achieve full indemnification. Similarly, one-way costs rules in favour of claimants may facilitate access to justice but also prevent indemnification of successful respondents.

The Commission has attempted in this Report to balance the competing goals in such a way as to achieve as many of its identified goals as realistically possible, while obtaining the best overall result. Ideally, the recommended reforms should be adopted as a package in order to maintain this overall balancing.

CHAPTER 3

MANITOBA'S EXISTING COSTS REGIME

A. INTRODUCTION

In Manitoba, section 96 of *The Court of Queen's Bench Act*[1] provides that costs are in the discretion of the court, and the court shall determine liability for costs and the amount of costs or the manner in which the costs shall be assessed. Queen's Bench Rules 57 and 58 deal with the award and fixing of costs, respectively. Rule 57.01(1) sets out the factors that the court may consider in the fixing of costs, including the amount in issue, complexity of the litigation, importance of the issues, conduct of the parties, and so forth. Generally speaking, the successful party will be entitled to an order of costs against the unsuccessful party, but costs are always in the discretion of the court.

Although the courts have not tried to define with any precision the degree of indemnification intended by an award of costs, such an award is clearly intended to be only a partial indemnity for the costs or fees that the successful party is obliged to pay to his or her own lawyer.

> No doubt every plaintiff would like to receive his damages intact, without at all assuming any portion of the costs of the litigation which he instituted. Perhaps in an ideal system (for plaintiffs), such a hope might be realized. But in the process it would result in the imposition of intolerable burdens upon defendants. Our system accordingly seeks for a just compromise or balance by requiring, or at least expecting, that the costs of litigation will be shared or distributed between the parties. Since costs normally follow the event, the heavier burden will be upon the loser. But the victor will not usually emerge without some contribution to the solicitor-and-client bill.[2]

Tariff A to the *Court of Queen's Bench Rules* governs the costs to be awarded as between party and party.[3] Tariff B deals with disbursements, and as a result is outside the scope of this Report.

In addition, Rule 49 provides for an award of double the tariff amounts (or for an award to an otherwise unsuccessful party) in situations where a party has made a settlement offer that is more generous than the result actually obtained at trial. This Rule is intended to encourage

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[1] *The Court of Queen's Bench Act*, C.C.S.M. c. C280.

[2] *Evaskow v. B.B.F.* (1969), 9 D.L.R. (3d) 715 at 720 (Man. C.A.).

[3] Man. Reg. 553/88, Rule 58.05(1).

settlement before trial.

The Rules do not attempt to define awards of costs on a "solicitor and client" basis, which in essence require a party to pay the actual amount of the fees that the other party has had to pay for the services of his or her lawyer. The courts will generally award solicitor and client costs only in exceptional circumstances, such as in order to condemn scandalous conduct or where unproven allegations of fraud are made.

Although Rule 57.03(1) directs the court to order costs of an interlocutory motion to be paid "forthwith" if satisfied that the motion "ought not to have been made or opposed," in fact such orders are made only in "exceptional circumstances".[4]

B. TARIFF OF COSTS

Rule 57.01(3) permits the court to fix costs, with or without reference to the Tariff, instead of having the costs assessed by an assessment officer under Rule 58. In practice, judges rarely fix costs;[5] as a result, in virtually all cases the quantum of costs is determined by reference to the Tariff.

Tariff A divides all proceedings into four classes, generally according to the amount in issue, and then block fees are awarded under each step in the proceeding. For example, fees are awarded for preparation of pleadings, discovery of documents, examinations for discovery, motions, preparation for trial or hearing, pre-trial conferences and counsel fees on court attendances. In all, it sets out the amount of costs payable for each of 20 possible steps in a proceeding, with the amount payable varying depending on the amount in issue in the proceeding. These amounts have remained essentially unchanged since 1989.

A Class I proceeding is one that falls under the jurisdiction of the court under *The Court of Queen's Bench Small Claims Practices Act*[6] (currently claims for $7,500 or less), and the costs payable are limited to $100 (plus disbursements) except in exceptional circumstances.[7] Class II proceedings are those in which the "class amount" (defined as the amount awarded, the amount a judge would have awarded had the party been successful or the amount claimed) is under $50,000 but greater than $7,500; Class III proceedings are those in which the class amount is between $50,000 and $150,000; and Class IV proceedings are those in which the class amount

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[4] *Nash* v. *Nash* (1996), 108 Man. R. (2d) 187 at 188 (Q.B.); see also *Lucky Venture Holdings Ltd.* v. *Dorge* (1991), 77 Man. R. (2d) 241 at 242 (Q.B.).

[5] Telephone conversation between Mr. Justice G. Jewers and MLRC Administrator, S. Pelletier (8 March 2005).

[6] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285.

[7] *The Court of Queen's Bench Small Claims Practices Act*, C.C.S.M. c. C285, ss. 3(1) and 14(1).

exceeds $150,000.[8]

Where the amount of money is not in issue, the court may award costs based on whichever class is, in the court's discretion, "just".[9] There does not appear to have been a great deal of discussion by the courts about determining the appropriate class for such cases.

Family proceedings are assigned to Classes on a somewhat different basis, depending on the nature of the particular proceedings as well as the amount involved.[10]

In order to calculate the total amount of costs payable in any given case, the applicable class must first be determined. After that, you must identify which of the 20 itemized procedures set out in the Tariff were, in fact, undertaken and add the amount referable to each of those steps, depending on which class applies. If appropriate, a step may be claimed for more than once (for example, there is an amount allowed for *each* half day of trial).[11] The applicable amounts are totalled, and the result is the total counsel fee that may be claimed.[12]

There is no data available on what proportion of actual costs are typically defrayed by a costs award based on the Tariff. While in the early 1990s it may have been as high as two thirds of actual costs, today it is variously estimated by some experienced practitioners as less than 50%, no more than 25% and, on occasion, even less than 10% of actual costs.[13]

C. COSTS ON SOLICITOR AND CLIENT BASIS

As earlier noted, the Rules do not currently address the award of costs on a solicitor and client basis, except to provide that nothing in Rule 57 "affects the authority of the court ... to award all or part of the costs on a lawyer and client basis".[14] Although highly unusual, such awards do occur from time to time. The Court of Appeal recently described the circumstances under which such costs awards may be made:

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[8] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Tariff A, s. 2(2).

[9] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Tariff A, s. 2(2)(b).

[10] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Tariff A, s. 2(3).

[11] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Tariff A, s. 3(2)(n).

[12] Claimable disbursements, such as filing fees, photocopy costs, witness expenses and the like are additional, but are outside the scope of this Report.

[13] Interview by MLRC Legal Counsel, S. Phillips with G. Stefanson, Chair, Civil Litigation Section, Manitoba Bar Association (16 March 2005); e-mail from V. Jackson, President, Manitoba Bar Association, to J. Penner (25 April 2005); comments by Commissioner K.C. Murphy (26 May 2005).

[14] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 57.01(6).

> Although the court certainly has the jurisdiction to make such an award, an award of costs on a solicitor and client scale should be ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The conduct of the offending party must be truly reprehensible, scandalous or outrageous.[15]

The general effect of an award of solicitor and client costs is to indemnify a party against their litigation costs to a much greater extent than occurs when costs are awarded on a party-and-party basis. Even so, such an award often does not constitute a *complete* indemnity.[16]

D. SELF-REPRESENTED LITIGANTS

Under the English common law as it developed from the late 19th century, a person who represented himself or herself successfully at trial was not entitled to an award of costs, other than disbursements properly incurred.[17] That rule has been questioned in the appellate courts of several Canadian jurisdictions in recent years and is no longer generally applicable.[18]

It is probably the law in Manitoba at present that self-represented litigants are entitled to costs, although not automatically and not at the Tariff level.[19] The Court noted in *Kuny v. Beamish* that "a rule precluding the recovery of costs has the effect of depriving the court of a useful tool to encourage settlements and to discourage or sanction inappropriate behaviour," and cited with approval the following statement by the Alberta Court of Appeal:

> The preferable approach is to view the matter of costs as discretionary. The court should seek an equitable result between the parties while balancing the various policy objectives of costs.[20]

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[15] *Kellogg Brown & Root Inc.* v. *Aerotech Herman Nelson Inc.* (2004), 238 D.L.R. (4th) 594 at 630 (Man.C.A.); leave to appeal to S.C.C. denied, [2004] S.C.C.A. 344 (Q.L.).

[16] M.M. Orkin, *The Law of Costs*, 2d ed., looseleaf (1987) at ¶103.

[17] *Tait v. Burns* (1892), 8 Man. R. 19 (Q.B.).

[18] See, *e.g.*: *McBeth v. Dalhousie College and University* (1986), 26 D.L.R. (4th) 321 at 329 (N.S.S.C. (A.D.)), 23 C.R.R. 317 (C.A.); *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C.C.A.); *Fong v. Chan* (1999), 181 D.L.R. (4th) 614 at 623 (Ont. C.A.); *Dechant v. The Law Society of Alberta* (2001), 203 D.L.R. (4th) 157 at 162 (Alta. C.A.). On the other hand, the traditional rule was recently affirmed in Newfoundland: *Franey v. Franey* (1997), 148 Nfld. & P.E.I.R. 181 at 197-198 (Nfld. C.A.).

[19] *Kuny v. Beamish* (2003), 172 Man. R. (2d) 28 at 35 (Q.B.).

[20] *Dechant v. The Law Society of Alberta*, *supra* n. 18, at 164.

CHAPTER 4

OTHER JURISDICTIONS

The Commission has considered the costs rules that are employed in several Canadian jurisdictions. We have identified jurisdictions that employ costs regimes that can be considered representative of all the primary variations on the "Canadian rule" (to coin a phrase). The courts in Ontario and British Columbia have, in recent years, undertaken significant reforms of their costs regimes. The changes have not been without controversy, and change continues to occur in response to some of the sharper criticisms. The reforms have not, however, altered the fundamental "loser pays" principle.

We have also looked abroad to the examples offered by other jurisdictions, particularly those that have undergone or considered reform in recent years. Recently, England dramatically revised its costs system, which is similar in principle to the Canadian system, to penalize parties who incur unnecessary or excessive costs in pursuing litigation. Australia's civil costs rules, and New Zealand's, offer some lessons as well. Germany is an example of a civil law jurisdiction that employs a more complete "loser pays" system than any common law jurisdiction.

Although the "loser pays" system tends to seem obvious and just to lawyers trained in the Canadian system, it is far from being the only one considered to be such. Our neighbours to the south, in the United States, take as their starting point the proposition that "fee shifting" (their term for costs awards) should only take place under exceptional circumstances and the "normal" rule is that all parties bear their own costs.

A. CANADIAN JURISDICTIONS

1. Ontario

Manitoba's current Rules of Court, which came into effect on 1 March 1988, were modelled closely on the Ontario Rules of Court, adopted in early 1984. Manitoba's costs rules were essentially identical to Ontario's until 2002, when dissatisfaction with the Ontario costs regime led to the formation of an *ad hoc* subcommittee of the Civil Rules Committee, led by Mr. Justice Ferrier, to recommend changes.[1] The subcommittee's report, submitted on 18 February 1999, recommended a number of changes. The recommendations were not fully accepted but, after extensive consultation with interested parties, they formed the basis for the introduction of a new "costs grid scheme" that came into effect on 1 January 2002. The policies behind the new scheme were said to be:

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[1] P.M. Perell, "Ontario's Costs Grid – Questions and Answers" (2002) 25 Adv. Q. 511 at 511.

> (1) except in exceptional cases and subject to the court's discretionary authority about costs, a party should not be delayed in recovering his or her costs (thus, the trend that had already been growing for courts to fix costs at a hearing was made the norm under the costs grid scheme); (2) to encourage greater consistency and predictability, the quantum of costs should be fixed with the guidance of two scales of costs that would replace the uncertainties, inconsistencies, and anachronisms of the former item-by-item tariff of costs; (3) the two costs grids scales should have names that are more communicative to the public, but these scales should play the same roles as the scales formerly known as "party and party" costs and "solicitor and client" costs.[2]

"Party and party" and "solicitor and client" costs were thus replaced by "partial indemnity" and "substantial indemnity" costs, respectively, which were calculated by reference to a "Costs Grid" that divided legal services into four categories. The first category allowed for costs calculated on an hourly basis for an enumerated list of legal services, up to a maximum hourly rate that varied depending on the lawyer's years of experience. The second, third and fourth categories allowed for costs of appearing, respectively, on a motion, trial or appeal, with maximum amounts varying according to the duration of the hearing.[3]

The new scheme quickly drew the ire of the judiciary who complained that they were having to deal with extensive hearings relating to costs issues that frequently exceeded in length the duration of the underlying proceedings on the merits. As well, concern was expressed that the grids were having an inflationary effect on costs awards,[4] and that awards were simultaneously becoming too unpredictable and failing to reflect the different costs of litigation in different areas of the province.[5] The Court itself noted: "It is fair to say that no rule amendment in recent history has engendered such a level of controversy".[6]

A subcommittee of judges of the Superior Court, chaired by Mr. Justice Power, recommended a "block fee" structure for fixing costs.[7] After further consultation, this recommendation did not find favour with the Civil Rules Committee and another subcommittee of that Committee was asked to determine whether it would be possible to develop a block fee structure that would address the identified problems with the costs grid system. That subcommittee noted:

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[2] *Id.*, at 511–512. It would appear, however, that courts had previously begun to move away from fixing costs: R.D. Malen, "The New Costs Rules: Theory Versus Practice" (2004), 28 Adv. Q. 432 at 435-436.

[3] Perell, *supra* n. 1, at 513-15.

[4] E-mail from J. Kromkamp, Senior Legal Officer, Court of Appeal for Ontario, to J. Penner (13 August 2004).

[5] Costs Subcommittee, Civil Rules Committee, Ontario Superior Court of Justice, *Costs Grid Consultation Paper* (27 February 2004), online: <http://www.ontariocourts.on.ca/notices/costgrid.htm> (date accessed: 9 August 2004).

[6] *Id.*

[7] Costs Subcommittee, *supra* n. 5.

It was agreed that a block fee structure has distinct advantages in providing predictability for the parties, consistency of application, and ease and expedience in reaching a result in a summary procedure. At the same time, it was recognized that a block fee structure could not provide proper indemnification in any given case, nor could it reflect regional differences, if the block fees are a fixed amount. It was also recognized that any fee structure would not accommodate the particular costs of every party in every conceivable circumstance. Even so, it was agreed that a block fee structure might be established that would, in turn, lead to the development of a set of normative or benchmark fees representing the normal or typical fees for certain types of proceedings.

In order to accommodate both regional differences in local fee rates and to provide room for varying elements in a particular case, it appeared to the Subcommittee that, rather than establishing set fees, the proposed structure ought to be based on a range of block fees within which the normative fees would, over time, become established. It was agreed that such a structure would best achieve the desired goals. At the same time, however, it was recognized that the range of block fees could not be so broad as to defeat the intended purpose. For example, a range of block fees for all motions that extended from $0 to $100,000 might well be broad enough to accommodate every possible motion but the range would then be so broad that normative or benchmark fees would be unlikely to develop. That result would, in turn, be unhelpful to counsel and clients in being able to predict the likely costs award for a particular motion. Similarly, such a broad range would likely lead to extensive submissions and material being filed in an effort to push the determination to the higher end of the range thereby undermining the desire to expedite the process and reduce the judicial time necessary to make a proper determination. Another likely consequence of overly broad ranges would be inconsistent awards for comparable matters.[8]

The Subcommittee's report and recommendations, submitted on 27 February 2004, did not receive universal support and the chair conceded that their proposal was merely the best that could be done within the subcommittee's narrow mandate.[9] The subcommittee's mandate was duly broadened and it provided a further report that was circulated for comment in September of 2004.[10] That proposal received favourable comment and was largely adopted when a new Rule was enacted in the spring of 2005.[11]

The new rule maintains the requirement that judges fix costs in most cases. It eliminates the Costs Grid and adds the following factors to Rule 57.01(1) as additional considerations for the court when fixing costs:

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[8] Costs Subcommittee, *supra* n. 5.

[9] Kromkamp e-mail, *supra* n. 4.

[10] Costs Subcommittee, *supra* n. 5.

[11] O. Reg. 42/05, in force 1 July 2005, amending the Rules of Civil Procedure, R.R.O. 194, 1990.

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;[12]

The following has been added to Rule 57.01:

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.[13]

"Partial indemnity costs" are now defined simply as costs awarded by the court in accordance with Rule 57.01(1). "Substantial indemnity costs" are defined as 150% of partial indemnity costs.[14] In addition, the concept of solicitor and client costs has been resurrected under a new name: "full indemnity" which the court is authorized to award in lieu of either partial or substantial indemnity costs.[15]

Form 57B, which must now be completed by every party who will be seeking costs (assuming the parties do not agree on the amount payable), requires the party to provide the following information to the court:

- the total amount claimed, broken down into fees, disbursements, and an estimated counsel fee for the appearance;
- specific submissions with respect to each of the factors set out in Rule 57.01(1) that the court is to take into account in making a costs award;
- the calculation of the fees claimed, setting out (for each item) the persons who provided the services, the hours spent, the hourly rate being claimed, and the actual hourly rate the client is being charged;details of the amounts being claimed for disbursements; and
- the lawyer's certification that the hours claimed have been spent, the rates being charged to the client are correct, and each disbursement has been incurred as claimed.[16]

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[12] O. Reg. 42/05, s. 4(1).

[13] O. Reg. 42/05, s. 4(3).

[14] O. Reg. 42/05, s. 1.

[15] O. Reg. 42/05, s. 4(2).

[16] O. Reg. 42/05, s. 6.

Unlike the existing Manitoba tariff, there is no specific list of items that can be claimed for. Instead, the Notice to the Profession simply lists the fee items which, in addition to the hearing, may be included in an award of costs:

> ... mediation under Rule 24.1, discovery of documents, drawing and settling issues on a special case, setting down for trial, pre-motion conferences, examinations, pre-trial conferences, settlement conferences, notices or offers, preparation for hearing, attendance at assignment court, orders issuing or renewing a writ of execution or notices of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notices of garnishment, or for any other procedure authorized by the *Rules of Civil Procedure*.[17]

The Notice to the Profession also sets out maximum rates that may be claimed for the services of law clerks, students-at-law and lawyers called to the Bar for less than 10 years, 10-20 years, or 20 years and over.

The court is now required in each case to "devise and adopt the simplest, least expensive and most expeditious process for fixing costs," which may include fixing them on the basis of written submissions without hearing oral argument.[18]

The new process draws heavily on a practice that had been adopted in Ottawa following the introduction of the costs grid. The County of Carleton Law Association (Ottawa) identified some of its benefits in a submission to the Costs Subcommittee:

> We believe that the "costs envelopes" which are presented to court before a hearing give the court a feel for what the parties' hourly rates are and what the parties' counsel genuinely believed their reasonable preparation time was, before they knew whether they had won or lost. Counsel know when they submit their envelopes that, in most cases, if they are asking for a certain number of hours and a certain hourly rate in the event that they are successful, they will be hard-pressed to argue that if their opponent spent the same amount of preparation time at a similar rate their opponent was acting unreasonably.
>
> We believe that requiring that these envelopes be submitted before the hearing, that is, before counsel know whether they are going to pay or be paid, has had the dual effect of moderating the numbers and of providing the court with an indication of what the parties

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[17] "Information for the Profession", on-line: Ontario Courts website, http://www.ontariocourts.on.ca/notices/rates.htm (date accessed: 13 July 2005).

[18] O. Reg. 42/05, s. 4(3).

really believe is reasonable.[19]

What is most interesting about this most recent costs experiment is that there is no indication (to date) as to what will generally be considered an appropriate level of "partial indemnity". Courts have been left with almost complete discretion in that regard.[20] While this provides the opportunity, at least, for costs awards to reflect the actual costs incurred by the parties accurately in each case, it also creates a situation where consistency and predictability will only be achieved – if at all – over time as the jurisprudence develops.

Ontario's costs system has thus undergone a series of dramatic changes in the past three years from the system that continues in place in Manitoba. While it is obviously too early to draw any conclusions regarding the functioning of the newly-introduced system, it certainly has undergone a lengthy process of investigation, discussion and revision and, as such, is worthy of consideration.

2. British Columbia

British Columbia revised its costs rules in 1990. The overall purpose of the reform "was to partially indemnify the successful litigant in the approximate range of 50 percent of actual legal costs," in accordance with a 1988 recommendation by the Justice Reform Committee.[21] The Attorney General's Rules Revision Committee recently noted that, if the tariff ever did achieve that goal, it no longer does and that, in fact, the level of indemnity is probably closer to 25-30%.[22]

British Columbia's costs regime is similar in principle to Manitoba's in that it provides for the payment of party-and-party costs according to a sliding scale, but it embodies greater flexibility and hence is more complex. Costs on Scale 1 are for "matters of little difficulty," while costs on Scale 5 are for "matters of unusual difficulty or importance".[23] The Tariff assigns a number or range of "units" to various steps in a proceeding, which are then totted up and

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[19]County of Carleton Law Association, *Submission of the County of Carleton Law Association (Ottawa) in Response to the "Costs Grid Consultation Paper" of the Costs Sub-Committee of the Civil Rules Committee* (28 April 2004) at 11, online: <http://www.ccla.ottawa.on.ca/ccla_images/Costs_Grid_2004/Final_Submission_of_CCLA_to_Civil_Rules_Costs_rev_April_28_2004.doc> (date accessed: 10 August 2004).

[20]E-mail from J. Kromkamp, *supra* n. 4.

[21]Hon. Justice M. Macaulay, "Attorney General's Rules Revision Committee Discussion Paper on the Tariff of Costs" (2003) 61 *The Advocate* 699.

[22]*Id.*

[23]*Supreme Court Rules*, B.C. Reg. 221/90, Appendix B: Party and Party Costs, s. 2(2).

multiplied by a value that is determined by the applicable scale.[24] Where judgment is entered on default of appearance or of pleading, a fixed amount is payable instead based on the amount in issue; the same is true for the costs of execution on such a judgment.[25]

In lieu of awarding costs under the Tariff, it is open to the Court to award "special" costs, which are essentially equivalent to solicitor and client costs.

> Special costs are mostly reserved for those situations where the unsuccessful party has been guilty of gross misconduct or the like. They are assessed on an objective basis: What would a reasonably competent solicitor charge for the services rendered? They will usually result in about an 80 to 90 per cent indemnity for fees assessed by the successful solicitor against the successful party under the Legal Profession Act.[26]

The 1990 Rules also provided for something called "increased costs," which was an intermediate level of costs between the Tariff and special costs. The provision in question stated:

> Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).[27]

The factors considered by the courts in determining whether increased costs would be payable included:

1. Disparity: Significant disparity between an award of ordinary costs and the amount that would be assessed for special costs.... As the disparity decreases, the need for some additional reason to warrant increased costs increases ....
2. Misconduct: Misconduct by one party which is deserving of condemnation....
3. Hard nosed and burdensome tactics....
4. Complexity and importance of the case....[28]

Despite those specific factors, however, the final test was whether, in all the circumstances, it would be "unjust" not to award increased costs.[29]

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[24] *Supreme Court Rules*, B.C. Reg. 221/90, Appendix B: Party and Party Costs, s. 3.

[25] *Supreme Court Rules*, B.C. Reg. 221/90, Appendix B: Party and Party Costs, Schedules 1 and 2 respectively.

[26] *Bradshaw Construction Ltd.* v. *Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at 324 (B.C.S.C.), aff'd , [1993] 1 W.W.R. 596 (B.C.C.A.).

[27] *Supreme Court Rules*, B.C. Reg. 221/90, Appendix B: Party and Party Costs, s. 7(1).

[28] *Wolford* v. *Shaw* (1999), 3 M.P.L.R. (3d) 146 at 151 (B.C.S.C.).

[29] *Monenco Ltd. v. Commonwealth Insurance Co.* (1999), 64 B.C.L.R. (3d) 307 at 310 (B.C.C.A.).

The increased costs provisions described above were repealed as of 1 July 2002.[30] In announcing the repeal, Chief Justice Bremner stated:

> The Rules Revision Committee has recently completed a review of the rules regarding costs. As part of that review, the Committee considered the rules relating to increased costs. The profession was invited to provide submissions to the Committee. Many expressed the view that applications to assess increased costs are costly and cumbersome and further, that reprehensible conduct is better addressed by special costs. The Committee is also of the view that increased costs were not an appropriate means of addressing any disparity between actual legal expenses and recoverable costs.[31]

As a result, parties in British Columbia are now left with the Tariff or the possibility of "special" costs, as described above.

3. New Brunswick and Nova Scotia

In 1982, New Brunswick adopted a greatly simplified tariff system as part of the overall revision of its Rules of Court. Effective 7 years later, on 1 January 1989, Nova Scotia adopted, in essence, exactly the same system.[32] It is of interest that the new tariff system arose out of a complete revision of the rules of court that was undertaken more or less simultaneously in Ontario and New Brunswick, and that the system had originally been proposed by the Ontario rules revision committee. Although the New Brunswick Rules of Court adopted in 1982 were broadly similar to the rules adopted by Ontario two years later,[33] the rule makers in Ontario decided against adopting the tariff system that New Brunswick had taken from the Ontario proposal.[34]

Unlike the system prevailing in Manitoba, under the New Brunswick and Nova Scotia costs rules, the court makes a lump sum costs award based on the "amount in issue" in the proceedings. Although the court retains the discretion to make whatever order of costs it considers appropriate, the tariff sets out the amount that will normally be payable by the unsuccessful party, and deviations are unusual. Following some judicial comments highly critical of the tariff's failure to keep up with inflation,[35] Nova Scotia amended the tariff in September 2004 to simplify it and increase the amounts payable; it did not, however, alter the basic

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[30] B.C. Reg 20/2002.

[31] D.I. Bremner, C.J., *Notice to the Profession Re Repeal of Increased Costs* (26 February 2002).

[32] The background to these developments is described in R.C. Stevenson, "Party-and-Party Costs: The New Approach" (1992) 14 Adv. Q. 129 at 130-131.

[33] And, therefore, to the current Manitoba rules.

[34] The foregoing is drawn from the discussion in Stevenson, *supra* n. 32.

[35] See, *e.g.*, *Cashen v. Donovan* (1999), 174 N.S.R. (2d) 320 at 327 (N.S.S.C.).

principles underlying the system.[36]

For any given "amount in issue", there are five (now three in Nova Scotia) possible scales on which the costs will be calculated. The default scale was supposed to represent approximately 40% of the actual legal fees that would be payable in a "typical" action.[37] The remaining scales represent lesser or greater percentages of the default scale amount. The court determines which scale is applicable by considering a number of factors, which include all of those set out in Manitoba's Rule 57.01 plus some others.[38]

Although the application of the tariff is relatively straightforward where litigation is about a discrete sum of money, it is somewhat more challenging when the subject matter of the litigation is non-monetary in nature. The courts have developed a number of approaches to dealing with such situations: attempting to value the issue by relating it to some quantifiable monetary claim or asset; generating an "amount in issue" by reference to the actual legal costs incurred that would provide a substantial contribution toward those costs; or using a rough "rule of thumb" based on the amount of time spent in court.

Both New Brunswick and Nova Scotia also have additional tariffs, for the purposes of assessing costs (a) in cases where default judgment is obtained, and (b) where a case is settled. Nova Scotia also has a separate tariff applicable to uncontested proceedings for foreclosure or for foreclosure and sale and, since September 2004, has a tariff applicable to chambers matters.[39] New Brunswick has a tariff for disbursements as well.

A great advantage of the New Brunswick/Nova Scotia system is that it eliminates any need for the preparation and/or taxing of bills of costs, thus saving time and expense for litigants. It also increases the ability of counsel to advise their clients in advance of the level of indemnity they can reasonably expect to receive (or be responsible to pay) at the end of a proceeding. Because the amounts payable are fixed according to the amount in issue in the proceeding, it was expected that there would also be a certain allowance for inflation built into the tariff – albeit connected to inflation not in legal fees, but more generally. The Nova Scotia experience, however, suggests that this expectation was illusory.[40]

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[36] *In the Matter of Party and Party Fee Tariffs made pursuant to Section 2 of Chapter 104 of the Revised Statutes of Nova Scotia, 1989, the Costs and Fees Act, and In the Matter of revisions to the Party and Party Fee Tariffs as determined in a report by the Costs and Fees Committee*, N.S. Gaz. 2004.1.2072.

[37] Stevenson, *supra* n. 32, at 132.

[38] Nova Scotia, *Civil Procedure Rules*, Rule 63.04 and Tariff A.

[39] *In the Matter of Party and Party Fee Tariffs*, *supra* n. 36.

[40] See, for example, W.A. Richardson, *A Running Commentary on Party and Party Costs and the Taxation of Legal Accounts in Nova Scotia*, at paras. 97-99, online: <http://www.nsbs.ns.ca/resources/tax_accounts1.pdf> (date accessed: 26 March 2005).

B. ENGLAND

England shares with Canada the primary principle that costs follow the event. It is important, however, to note a fundamental difference between English costs rules and those that apply in Manitoba (and most other Canadian jurisdictions): there is no "tariff" of costs, but rather the calculation of costs is based in the first instance on parties' *actual* incurred costs. For this reason, costs awards in England have typically resulted in indemnification of a higher proportion of litigants' costs than is generally found in Canadian jurisdictions.[41]

During the mid 1990s, Lord Woolf undertook a comprehensive review of the entire English civil justice system and his recommendations included significant changes to the system of awarding costs. It is impossible now to understand the costs system in England without some understanding of the resulting reforms as a whole.

The new Civil Procedure Rules, which came into force on 26 April 1999, constitute "a new procedural code with the overriding objective of enabling the court to deal with cases justly".[42] The Rules themselves define what is meant by "justly":

> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. [43]

As described by one learned commentator, the new Rules are intended to embody a "three dimensional concept of justice": not only is the court to be concerned about doing justice on the merits of each case, but it is considered equally important that it decide cases within a reasonable time and use no more than "proportionate" resources in doing so.[44] The Rules require the court to manage cases actively so as to achieve these tripartite goals, and the provisions relating to costs

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[41] Various commentators have estimated the typical indemnity to be in the range of 66-90% of actual costs: E.T. Spink, *Party and Party Costs* (unpublished paper, Alberta Law Reform Institute, 1995) at 11.

[42] *The Civil Procedure Rules 1998*, S.I. 1998/3132, s. 1.1(1).

[43] *The Civil Procedure Rules 1998*, S.I. 1998/3132, s. 1.1(2).

[44] A.A.S. Zuckerman, *Civil Procedure* (2003) at 2-3.

reflect this fact. In particular, the costs provisions strive to achieve the goal of "proportionality". As was the case prior to the reforms, there are two bases on which the court may make an award of costs: the "standard" basis and the "indemnity" basis.[45] The Rules require that the level of costs payable under an award of "standard" costs be both reasonable and proportionate, with doubt about particular items of costs being resolved in favour of the paying party. Under the "indemnity" basis, the level of costs need only be reasonable, and doubt is resolved in favour of the *receiving* party.[46]

Although the starting point in making a costs award is still the principle that a successful party is *prima facie* entitled to costs, the court is required to consider the extent to which the parties have succeeded on the various points in issue.[47] Thus, although a party might be "successful" on the main issue, the other party may be entitled to costs relating to other issues on which *it* was successful. This requires much more flexible jurisdiction to fashion appropriate costs awards, which is provided by Rule 44.3:

> (6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
> (b) a stated amount in respect of another party's costs;
> (c) costs from or until a certain date only;
> (d) costs incurred before proceedings have begun;
> (e) costs relating to particular steps taken in the proceedings;
> (f) costs relating only to a distinct part of the proceedings; and
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

Thus the court may order that a successful party only receive a percentage of its costs, or the costs it incurred before or after a given date. While these provisions give the court much more flexibility in making costs orders, they also make the process much more complicated. It is with reason that the following comment was recently made regarding the law relating to costs in England:

> The subject of costs, which would deserve only modest attention in a well-balanced system, requires extensive treatment in England. Far from being of incidental aspect, the various aspects of litigation costs occupy a central place in the English

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[45] Spink, *supra* n. 41, at 8.

[46] *The Civil Procedure Rules 1998*, S.I. 1998/3132, s. 44.4(3).

[47] *The Civil Procedure Rules 1998*, S.I. 1998/3132, s. 44.3(4), (5)

> administration of civil justice. Issues concerning who should bear the costs and their calculation can themselves give rise to litigation, which is liable occasionally to be more extensive and costly than the litigation over the merits of the underlying dispute. Paradoxically, this is even more so today. Precisely because one of the main goals of the CPR is to drive down the cost of litigation, cost considerations now permeate case management decisions and the exercise of discretion in procedural matters generally.[48]

Whatever the merits of the 1999 overhaul of the Rules of Civil Procedure to reflect the principle of proportionality, it is apparent that the current costs regime has serious problems. It cannot be desirable for a system relating to costs to encourage costly and time-consuming "satellite" litigation in the way that the new Rules evidently do. The goal of predictability and certainty appears to have been largely sacrificed in the expectation of achieving more objectively "just" dispositions – at the same time that the civil justice system as a whole has been re-oriented to make doing justice on the merits of each case only *one* of the goals of the system. It is more than mildly ironic that a reform intended to ensure that costs awards are "proportionate" in all the circumstances requires litigants to expend such disproportionate time, effort and expense.

C. UNITED STATES

As noted above, the "normal" rule in the United States, both in federal and in state courts, is that all parties bear their own costs except in unusual circumstances. Although the rule "remains a bedrock of American jurisprudence,"[49] the exceptions to it are so numerous as to call into question how much of a "rule" it actually is. For example, by 1984 there were almost 2,000 statutes that stipulated some form of "fee shifting" in particular kinds of cases.[50] In addition there are judge-made exceptions, including the "bad faith" and the "common fund" exceptions.[51] Furthermore, civil juries (which are common in the United States, although almost non-existent in Manitoba) apparently will often award costs indirectly by including them in damage awards.[52]

The primary justification for the American rule flows from an inherent belief in the importance of access to the courts to enable the righting of wrongs. The theory is that a person with a legitimate grievance, faced with the prospect of having to pay his opponent's legal costs

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[48]Zuckerman, *supra* n. 44, at 862.

[49]E.F. Sherman, "From 'Loser Pays' to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice" (1998) 76 Tex. L. Rev. 1863 at 1866.

[50]"State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?" (1984) 47 Law & Contemp. Probs. 321 at 322.

[51]J. Leubsdorf, "Toward a History of the American Rule on Attorney Fee Recovery" (1984) 47 Law & Contemp. Probs. 9 at 29. The "common fund doctrine" allows a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees.

[52]Spink, *supra* n. 41, at 25-31.

in the event he does not prevail at trial (for whatever reason), may be dissuaded from pursuing or defending his rights.[53] The circumstances in which the rule has been modified tend to involve plaintiffs who it is thought should be encouraged to bring their causes before the courts, such as those bringing suit in defence of their civil rights or the environment.[54] Most of the modifications involve the introduction of "one-way" fee shifting, so that a successful plaintiff is awarded costs, but a successful defendant is not.

There is some reason to believe that the American rule provides a greater incentive than the Canadian rule to initiate litigation with a low probability of success, while the Canadian system provides a greater incentive to initiate litigation with a *high* probability of success,[55] although it can hardly be said that the evidence is conclusive.[56]

Although defended fiercely by many American practitioners and jurisprudential theorists,[57] the American rule is found in virtually no other jurisdiction in the world,[58] and is subject to numerous exceptions and qualifications even in the United States. These facts limit its relevance to the Canadian and, more particularly, the Manitoban situation. Notwithstanding the suggestion of the Manitoba Court of Appeal in 1979 that the "trend in this jurisdiction is towards [the American] position,"[59] the American rule is based on a philosophically and doctrinally alien premise, and the Commission does not consider that its advantages outweigh its disadvantages.[60]

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[53]Sherman, *supra* n. 49, at 1863-1864.

[54] Sherman, *supra* n. 49, at 1865-1866.

[55]J.D. Wilson, "Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and an Application to the Shareholders' Derivative Action" (1985) 5 Windsor Y.B. Access Just. 142 at 144.

[56]R. Braeutigam, B. Owen, & J. Panzar, "An Economic Analysis of Alternative Fee Shifting Systems" (1984) 47 Law & Contemp. Probs. 173 at 181.

[57]See, *e.g.*, P.J. Havers, "Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems" (2000) 14 Notre Dame J.L. Ethics & Pub. Pol. 621 and M.I. Gross, "Loser-Pays – Or Whose 'Fault' Is It Anyway: A Response to Hensler-Rowe's 'Beyond 'It Just Ain't Worth It'", 64 Law & Contemp. Probs. 163 (Spring/Summer 2001).

[58]Australian Law Reform Commission, *Costs shifting – who pays for litigation?* (Report #75, 1995), Appendix C. It is of interest that a recent proposal for a set of international principles and rules of civil procedure opted not to recommend the American rule: G.C. Hazard, Jr., R. Stürner, M. Taruffo, and A. Gidi, *Joint American Law Institute/Unidroit Working Group on Principles and Rules of Transnational Civil Procedure* (Rome: International Institute for the Unification of Private Law, April 2003) at 28 and 63, online: <http://www.teoriageraldoprocesso.adv.br/transnationalprocedure_unidroit.pdf> (date accessed: 10 December 2004).

[59]*Western Finance Co. v. Tasker Enterprises Ltd.* (1979), 106 D.L.R. (3d) 81 at 100 (Man. C.A.); see, however, the comments of Schwartz J. in *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.* (1988), 53 Man. R. (2d) 130 at 133-134 (Q.B.).

[60]A very helpful and thorough review of the history of the American rule, and its current practice, can be found in Spink, *supra* n. 41, at 16-31.

D. AUSTRALIA

Australia's court systems[61] employ the same general costs system, known there as the "costs indemnity rule", as Manitoba and other Canadian jurisdictions.[62] Like Manitoba, most jurisdictions rely on various tariffs, or "fee scales", to determine the amount of costs payable. One difference between the Australian and Canadian systems concerns the degree of indemnification provided: in Australia, successful parties are generally awarded a greater proportion of their actual legal costs than typically happens in Canada – probably as much as 60-70%.[63] This seems to result from the governing principle, similar to the English rule, that the successful party is entitled to reimbursement of all "reasonable" costs incurred.

A curious feature of the Australian fee scales is that they serve two quite distinct functions: in addition to forming the basis for calculating party and party costs, they are also used to determine the amount owing from a client to his or her solicitor in circumstances where there is no enforceable agreement between them as to fees.[64]

Parties may also be awarded "indemnity" costs (the equivalent of solicitor and client costs) in very unusual cases, where "a sufficient special or unusual feature" is present.[65]

The Australian Law Reform Commission studied the issue of costs in 1995 and made a number of recommendations for reform of the Australian system.[66] Although the report's recommendations were specific to the federal courts, the hope was expressed that they would be adopted uniformly in all Australian jurisdictions. The recommendations do not appear to have been adopted to date, although several have been recommended for adoption by the Attorney General's Department.[67] We will describe some of the more interesting recommendations later in this Report.

A review of the federal fee scales in 1998 on behalf of the Attorney General recommended a unique method of calculating party-and-party costs in the normal course, intended to encourage

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[61] As in Canada and the United States, each of the six states and the Commonwealth (federal) has a separate court system.

[62] Australian Law Reform Commission, *supra* n. 58, at ¶4.2.

[63] Spink, *supra* n. 41, at 36, n. 129.

[64] P. Williams, et al., *Report of The Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Attorney-General's Department, 1998) c. 1 ("Williams Report").

[65] See, *e.g.*, *Harrison v. Schipp*, [2001] NSWCA 13 at paras. 132-39, and *Colgate-Palmolive Pty Ltd v Cussons* (1993), 46 F.C.R. 225 at 233-4.

[66] Australian Law Reform Commission, *supra* n. 58.

[67] Australia, Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (Attorney-General's Department, December 2003) at 206-10.

settlement.[68] The recommendation was that a judge should determine the level of difficulty of the case (on a 5 point scale) at an initial Directions Hearing, held shortly after the close of pleadings. In the absence of an order from the court providing differently, the costs payable at the conclusion of the matter would then be determined by cross-referencing that level of difficulty and the stage of the matter at which the proceedings were terminated.[69] The earlier in the proceedings the matter was terminated, the more likely it would be that the costs payable would approximate the actual costs incurred to that point. The longer the litigation proceeded, the greater the difference between the costs payable and the actual fees and expenses incurred. This recommendation was generally favourably received, although the amounts in the fee scale were said to be somewhat low, and it appears that it may be adopted in an amended form.[70]

E. NEW ZEALAND

The costs rules in the High Court of New Zealand are similar in principle to those found in Canada. The regime is intended to provide predictability, consistency and expedition. Rule 47 of the *High Court Rules* sets out the applicable principles:

> The following general principles apply to the determination of costs:
>
> (a) The party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
> (b) An award of costs should reflect the complexity and significance of the proceeding:
> (c) Costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
> (d) An appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
> (e) What is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the actual solicitor or counsel involved or on the time actually spent by the actual solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
> (f) An award of costs should not exceed the costs incurred by the party claiming costs:
> (g) So far as possible the determination of costs should be predictable and

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[68] Williams Report, *supra* n. 64, c. 4.

[69] The authors of the report conducted significant research in an attempt to determine the actual costs incurred by parties in various types of litigation at various stages of the litigation, and used that data as the basis for the scale of costs.

[70] Australia, Attorney-General's Department, *supra* n. 67, at 206-210.

expeditious.[71]

Determining the amount payable with respect to any given step in a proceeding involves cross referencing two factors: the complexity or significance of the proceedings (Category 1, 2, or 3, set out in Schedule 2) and representing the amount of time reasonably necessary for that step (Band A, B, or C, set out in Schedule 3). Calculating the costs payable thus involves multiplying the appropriate daily recovery rate by the applicable fraction of a day, and then, in accordance with Rule 47(d), awarding two thirds of that amount.

In addition, the Rules permit the award of "increased" costs or "indemnity" costs under appropriate circumstances[72] and permit the court to refuse to order costs, or reduce the amount of a costs award under certain circumstances.[73]

F. GERMANY

Germany is not a common law country but is of interest as a jurisdiction which "observes the 'loser pays' rule on court costs and attorneys' fees more faithfully than any other modern jurisdiction".[74] Legislation sets out the amount that lawyers may charge their clients (absent an agreement allowing higher fees), which varies according to the amount at issue and the stage that the litigation has reached. Unsuccessful litigants must pay costs based on those amounts which results, in most cases, in complete indemnification. This allows German litigants to calculate with precision the amount of costs they may become liable to pay at any given stage in the litigation, information which is taken into account when deciding whether to settle or withdraw claims.[75]

An important qualification of the German rule is the principle that successful litigants are only entitled to be indemnified for costs that were *necessary*. Thus, reimbursement will be refused for expenses related to procedures that were not strictly needed, and an otherwise successful party will not be required to indemnify the other party for costs related to unnecessary or uneconomical procedural acts or motions. This is seen as a valuable means of promoting

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[71] *High Court Rules*, being Sch. 2 to the *Judicature Act 1908*, S.N.Z. 1908, c. 89, s. 47.

[72] *High Court Rules*, being Sch. 2 to the *Judicature Act 1908*, S.N.Z. 1908, c. 89, s. 48C.

[73] *High Court Rules*, being Sch. 2 to the *Judicature Act 1908*, S.N.Z. 1908, c. 89, s. 48D.

[74] P.L. Murray and R. Stürner, *German Civil Justice* (Carolina Academic Press, 2004) at 341.

[75] *Id.*, at 341ff.

procedural economy and enforcing the duty of good faith, openness and cooperation in litigation.[76]

G. CONCLUSION

It can readily be seen that there have been a number of different approaches adopted in various jurisdictions to address the constant tensions in any system of litigation costs described in Chapter 2. Different jurisdictions have resolved these tensions in different ways, weighed the competing concerns differently and devised a variety of systems that function quite differently. Arguably, the reforms in England and Ontario favour too greatly the principle of "getting it right," while the system in use in New Brunswick and Nova Scotia may be criticized for emphasizing simplicity and clarity above all else. British Columbia's costs regime has greater flexibility than Manitoba's, while the link in Germany and Australia between the costs tariff and the fees that lawyers may charge their clients is simpler and ensures a greater degree of indemnity.

In the following Chapter, the Commission will discuss ways in which a more appropriate balance can be struck in Manitoba, adopting some of the best practices seen in other jurisdictions in order to achieve the goals identified in Chapter 2.

[76] W. Pfennigstorf, "The European Experience with Attorney Fee Shifting" (1984) 47 Law & Contemp. Probs. 37 at 51.

CHAPTER 5

PROPOSED REFORMS

This chapter will focus on the question of whether Manitoba's existing costs structure needs to be improved to ensure that it better achieves the goals identified by the Commission in Chapter 2.

With respect to *indemnification*, it seems clear that the existing Tariff does an inadequate job of defraying the actual costs of successful litigants. The Tariff has not changed in 16 years, and now permits the recovery of less than half of actual expenses – perhaps as little as 25%.[1] Whatever level of indemnification is considered appropriate, it must be greater than this. The Commission therefore considers that reform is necessary to ensure a greater level of indemnification.

The Commission also believes that reform is necessary to ensure that the costs rules provide a greater *deterrent* to frivolous actions and defences. This is in part because the Tariff amounts are so low, but it may also be in part because of a lack of appreciation by parties of the costs consequences of their behaviour. The Commission considers that reform is needed to discourage moe effectively improper or unnecessary steps in litigation and to help litigants appreciate the actual costs of litigation.

In the Commission's opinion the existing costs rules are relatively *easy to understand and simple to apply* – that is, in fact, one of their greatest strengths, and a highly desirable feature of the current rules. Accordingly, any reforms introduced should not significantly compromise this situation.

The Commission does not believe that Manitoba's existing costs rules sufficiently encourage settlement at various stages of the litigation. Rule 49 certainly provides a powerful incentive to make reasonable settlement offers, but the Commission is of the view that costs rules can provide even more incentive. While acknowledging that costs rules are rarely the determining factor in making decisions regarding settlement,[2] the Commission considers that they can play a greater role than they currently do.

The costs regime in Manitoba does not, in the Commission's opinion, impede access to the courts inappropriately. Even so, the law relating to self-represented litigants should perhaps be codified and made more clear, and reforms could be introduced to help "level the playing

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[1]Interview by MLRC Legal Counsel S. Phillips with G. Stefanson, Chair, Civil Litigation Section, Manitoba Bar Association (16 March 2005); e-mail from V. Jackson, President, Manitoba Bar Association, to J. Penner (25 April 2005).

[2]Australian Law Reform Commission, *Costs shifting – who pays for litigation?* (Report #75, 1995) at ¶4.15.

field" with respect to litigants with different levels of resources. It is important to note that, in the Commission's opinion, costs rules can only ever be a part of the solution to the problem of access to justice and must be considered as complementary to procedural controls, case management systems and other initiatives.

The judges of the Court of Queen's Bench have a reasonable amount of *flexibility* within the current system, and the Commission does not believe that that flexibility needs to be significantly expanded or constricted, although it believes that the framework within which it is exercised *does* need reform.

The following is a discussion of specific reforms that the Commission considers necessary or desirable to improve the costs rules in the Court of Queen's Bench.

A. PRINCIPLES GOVERNING COSTS AWARDS

The threshold question for the Commission was whether there is any reason to change the basis of the present costs regime, *i.e.*, the presumption that a successful litigant is entitled to have some portion, but not all, of their expenses (including legal fees) defrayed by the unsuccessful party or parties. The two alternatives to this regime are those found in the United States and Germany. In the former jurisdiction, the default rule is that parties are entirely responsible for their own legal costs and *only* their own costs. In the latter, unsuccessful parties automatically pay both their own costs and *all* of the successful parties' reasonably incurred costs.

As suggested in Chapter 4, above, the Commission does not consider that the "American rule" is appropriate for adoption in Manitoba. It is not consistent with the historical English or Canadian rule and does not allow for the achievement of any of the goals that the Commission considers desirable (other than having the virtue of simplicity and predictability). The Commission also considers it desirable that litigants whose position has been vindicated should be, at least to some extent, "made whole" by the unsuccessful party or parties.

The Commission is also persuaded that complete indemnification of successful litigants would inappropriately discourage potentially meritorious claims and as such would impede access to justice. We do not believe it desirable or appropriate to adopt a German-style system of tariffs that would determine the compensation payable to lawyers by their clients, nor do we believe that litigants' exposure to an award of costs should be determined by their opponents' choice of counsel or litigation tactics,[3] as can occur under the new Ontario system.

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[3]By way of example, a plaintiff could increase the amount of costs payable by an unsuccessful defendant by retaining a lawyer whose hourly rate is exorbitant, and by initiating a multiplicity of interlocutory applications or otherwise maximizing the time and expense involved.

The Commission is persuaded that the costs rules need to enable the courts to achieve as many as possible of the desirable goals identified by the Commission. There can be little doubt that appropriate costs rules are immensely useful as litigation management tools.

> Costs are a known and accepted procedural mechanism that should not be rejected as a litigation management tool, or even ignored as much as they have been. Despite Lord Woolf's unqualified 1995 statement that orders for costs "... are an ineffective sanction applied after the damage is done", experience suggests that costs awards can be a powerful general deterrent, particularly when the costs stakes are relatively high....[4]

For those reasons, the Commission considers it appropriate to retain the current default rule.

RECOMMENDATION 1

The default rule should continue to be that a successful party is entitled to an award of costs to indemnify him or her partially against costs incurred.

B. CALCULATION OF COUNSEL FEES

A fundamental issue in the design of a costs regime is how to determine the level of counsel fees (generally the most significant component of costs and the only component with which this Report is concerned) to be awarded under the costs rules. Manitoba, most other Canadian jurisdictions, Australia, New Zealand and Germany currently use some form of tariff that sets out the amount payable, or a range of amounts payable, under specific circumstances. The greatest virtue of such a system is its ability to provide simplicity, clarity and predictability, which the Commission considers highly desirable. Its disadvantages can include inflexibility and an inability to provide an appropriate amount of indemnification, both in particular cases and over time, as the amounts set out in the tariff lose their connection to actual litigation costs.

The alternative to a tariff system is basing the amount of counsel fees payable on the parties' actual costs. This is the approach adopted in Ontario, England and the United States (in those circumstances in which costs are payable). This system allows the court to ensure an appropriate level of indemnification in every case. In England, the court is required to ensure that the costs awarded do not merely reflect the actual costs incurred, but that those costs are in fact proportionate in the context of the litigation as a whole. Unfortunately, the flexibility inherent in this system means that it is also more time-consuming and expensive, and significantly reduces the ability of parties to predict their costs exposure if unsuccessful.

> Recent Canadian reforms appear to favour increased flexibility in costs rules. In the view of the Task Force, this trend should be supported. At the same time, it is important to maximize certainty in costs awards, so as to allow parties to assess the risks

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[4] G. Turniff, "Exploiting the Costs Symbiosis" (2000) 58 *The Advocate* 699 at 702.

involved in litigation. Costs awards are an important incentive governing settlement behaviour and influencing the time required for a case to move through the system.[5]

The Commission considers that, on balance, the virtues of a tariff system are sufficient to outweigh the undoubted desirability of ensuring an accurate and appropriate costs order in every case. Simplicity and clarity are fundamentally important attributes in a costs system, and the Commission considers that it is possible to design a tariff system with enough flexibility to permit broadly appropriate costs awards in all cases.

RECOMMENDATION 2

Counsel fees payable should continue to be calculated on the basis of a tariff.

1. Appropriate Level of Indemnity

Given that the Commission believes that a successful party is to be entitled to something less than complete indemnity, what is an *appropriate* level of indemnity? This again varies from jurisdiction to jurisdiction; as noted above, the British Columbia tariff was expected to provide approximately 50% indemnity while, in Nova Scotia, it was expected to provide 40%. The current Alberta Tariff is intended to provide a level of indemnity somewhere in the range of 30-50%.[6] In Ontario, the appropriate level is considered to be approximately 60%.[7] The level of indemnification achieved in Australia and England is much higher: 60-70% in the former, and 66-90% in the latter.

In determining the appropriate level of indemnity, the desirability of "making whole" a victorious litigant must be explicitly balanced against the risk of inappropriately limiting access to the courts by parties with a potentially meritorious case but limited means. The court does not have the discretion to refuse to award costs solely because an unsuccessful litigant has limited means,[8] although it should be possible to address concerns about access in other ways, some of which are discussed below.

It is also appropriate to note that a tariff that sets costs at a level that is too low will not

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[5] *Report of the Canadian Bar Association Task Force on Systems of Civil Justice* (1996), at 46, online: <http://www.cba.org/CBA/cba_reports/pdf/systemscivil_tfreport.pdf> (date accessed: 13 March 2005).

[6] Alberta Law Reform Institute, *Alberta Rules of Court Project: Costs and Sanctions* (Consultation Memorandum #12.17, 2005) at 4.

[7] Costs Subcommittee, Civil Rules Committee, Ontario Superior Court of Justice, *Costs Grid Consultation Paper* (27 February 2004), online: <http://www.ontariocourts.on.ca/notices/costgrid.htm> (date accessed: 9 August 2004).

[8] See, *e.g.*, *Claessins v. Wice* (1991), 56 B.C.L.R. (2d) 110 (C.A.); *Callahan v. Goldboro-Bayview District Board of Trade* (1981), 46 N.S.R. (2d) 451 (N.S.S.C. (A.D.)).

accomplish several of the important goals cited by the Commission, including discouraging inefficient litigation.[9] On the other hand, access to justice is affected not only by *who* has to pay costs, but by *how much* they have to pay,[10] so that a tariff that indemnifies to too great a degree will impede access to justice.

Manitoba's Tariff probably provided indemnification of approximately 60% of actual fees when it was introduced in 1989. The Commission considers that, in all the circumstances, this is an appropriate level of indemnification.[11] When setting the tariff levels, of course, it may be necessary to take into account the fact that the level of fees charged will vary from case to case for a number of reasons. This problem has been dealt with in Alberta by giving taxation officers the authority to reduce amounts payable under the Tariff where to do otherwise would result in over-indemnification.[12]

It will also be desirable when setting the tariff levels to bear in mind that what is to be reimbursed is "reasonable" costs. This is reflected in the standard described by the New Zealand legislation, that "an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the actual solicitor or counsel involved or on the time actually spent by the actual solicitor or counsel involved".[13] What we mean by this is that the tariff should be set at a level that reimburses approximately 60% of "reasonable" costs and not, strictly speaking, 60% of experienced costs.

RECOMMENDATION 3

The tariff should be designed to provide indemnification of approximately 60% of reasonable counsel fees in a typical case.

C. COSTS CLASSES

Although the existing Tariff has four classes, Class I is applicable only to small claims proceedings, which means that effectively every civil proceeding in the Court of Queen's Bench is assigned to one of three Classes, based on the "claim amount". The question arises whether this is an appropriate number of classes, or whether greater refinement of them is necessary.

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[9] E.T. Spink, *Party and Party Costs* (unpublished paper, Alberta Law Reform Institute, 1995) at 64-65.

[10] Australian Law Reform Commission, *supra* n. 2.

[11] It seems that whatever level of indemnification is chosen will be more or less arbitrary, but 60% seems to the Commission to be a substantial contribution to the expenses incurred by a victorious litigant without imposing excessive demands on the "loser".

[12] *Shillingford v. Dalbridge Group Inc.*, [2000] 5 W.W.R. 103 at 109 (A.B.Q.B.).

[13] *High Court Rules*, being Sch. 2 to the *Judicature Act 1908*, S.N.Z. 1908, c. 89, s. 47.

1. Number of Classes

As a general proposition, it seems apparent that the fewer classes there are, the less likely it is that an award of costs in a specific case will approximate the appropriate level of indemnification for that specific case. This is because each category will encompass a wider range of cases, meaning that cases at the the upper and lower reaches of the category can differ significantly in their cost to prosecute or defend. A small number of categories therefore makes it difficult to set tariff amounts that will appropriately indemnify litigants in many cases.

Many other jurisdictions that rely on tariffs employ a larger number of gradations. British Columbia, for example, has five, as does the Federal Court,[14] although they are not based on the "claim amount," as is Manitoba's. Instead, in British Columbia they are based on the degree of "difficulty or importance" of the case,[15] while the Federal Court considers a wide range of factors in determining which class is applicable.[16]

Nova Scotia recently reduced the number of classes in its tariff – from 24 to 11, each of which is based on the "amount involved".[17] Previously the highest level was for cases where the amount involved was "more than $100,000"; that has now been increased to "more than $1,000,000". By contrast, Manitoba's existing Class IV, the highest class, applies to all matters in which the class amount exceeds $150,000.

New Zealand has three categories based on the complexity of the proceedings, which are cross-referenced to three "bands" based on the amount of time considered necessary for particular steps,[18] meaning that there are effectively nine possible categorizations for any given proceeding.

The Commission is persuaded that three categories are insufficient to achieve appropriate levels of indemnification in many cases. It is not persuaded, however, that the number of categories need be as large as in Nova Scotia; in that jurisdiction, the larger number of categories is undoubtedly more desirable because the tariff only provides a single lump sum amount for each category. In Manitoba, by contrast, more flexibility is provided by the identification of specific amounts payable for specific steps within the proceeding.

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[14] *Federal Court Rules, 1998*, S.O.R./98-106, Tariff B.

[15] *Rules of Court*, B.C. Reg. 221/90, App. B, s. 2(2).

[16] *Federal Court Rules, 1998*, S.O.R./98-106, s. 400(3); see, *e.g.*, *Ludco Enterprises Ltd v. Canada.*, 2002 FCA 450 at para. 7

[17] *In the Matter of Party and Party Fee Tariffs made pursuant to Section 2 of Chapter 104 of the Revised Statutes of Nova Scotia, 1989, the Costs and Fees Act, and In the Matter of revisions to the Party and Party Fee Tariffs as determined in a report by the Costs and Fees Committee*, N.S. Gaz. 2004.1.2072.

[18] *High Court Rules*, being Sch. 2 to the *Judicature Act 1908*, S.N.Z. 1908, c. 89, ss. 48(1), 48A.

RECOMMENDATION 4

There should be six classes in the tariff.

2. Basis for Classes

As noted above, assigning claims to a Class on the basis of the sum of money involved is not the only possible system. The advantage of such a system (at least with regard to claims involving sums of money) is its relative simplicity and predictability. Unfortunately, it runs the risk of lumping together very simple and very complex claims that happen to involve approximately the same amount of money, potentially resulting in over-indemnification in some cases and under-indemnification in others. By way of example, a straightforward action in debt and a complex constructive trust case with multiple parties and difficult issues of fact and law may both involve a claim for a similar amount of money, in which case the class to which they are assigned will be the same even though the cost of bringing each to trial will likely be vastly different.

This objection is met, in part, by the fact that the amount of costs awarded in these two hypothetical proceedings will not be the same as the Tariff amounts will be based on the steps taken in the proceeding, and presumably the more complex matter will require more steps, more days of trial, and so forth. Nevertheless, the Commission considers that it would likely be more equitable to have the more complex action result in an award of costs based on a higher Tariff class than that applicable to the more straightforward action.

This result can be achieved using a scale similar to that in use in British Columbia where the applicable costs scale is determined based on the relative degree of difficulty and/or importance of a proceeding. The Commission believes this to be a more appropriate means of differentiating between proceedings than merely relying on the amount of money in issue. It is important, however, that, in applying the Tariff, the judiciary should not be reluctant to depart from the default scale when it is appropriate to do so, as appears to have occurred in British Columbia.[19]

RECOMMENDATION 5

Proceedings should be assigned to Classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue.

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[19]Hon. Justice M. Macaulay, "Attorney General's Rules Revision Committee Discussion Paper on the Tariff of Costs" (2003) 61 *The Advocate* 699 at 700.

The most cogent objection to assigning proceedings to a class on the basis of their importance and/or difficulty is the degree to which it diminishes the clarity and simplicity of the system, an important goal for the Commission. Parties will not necessarily be able to foresee with confidence the amount of costs that will be awarded at the conclusion of the proceedings.

This problem could be overcome by adopting a recommendation made in Australia,[20] namely that, at an initial Directions Hearing held shortly after the pleadings have closed, a judge would determine the degree of complexity presented by the matter and would assign it to the applicable tariff category. Any costs orders made in the proceeding would then be based on that category – subject always to the court's overriding discretion to order costs on some other basis where it is just to do so.

The Commission sees a great deal of merit in this approach. It should, of course, be open to the parties to agree on the appropriate costs scale rather than requiring the court to set it, and provision should be made for this possibility. This would lessen the administrative burden on the courts that would result from requiring a directions hearing for every proceeding. The Commission considers that the best way to deal with the issue is to require every party to file a form, at or near the time it files its first pleading, on which it sets out what it considers the appropriate costs class to be for the proceeding. Only if the parties differ would it be necessary for the court to get involved. The Commission is content to leave to the discretion of the Court of Queen's Bench Rules Committee the details of the process and the forms required.

RECOMMENDATION 6

Parties should be required to indicate, at or near the time that they file their first pleading, what Class they believe the matter should be assigned to. If parties are unable to agree, the court should assign the matter to the appropriate Class after hearing from the parties.

D. COSTS OUTLINES

One of the innovations that Ontario has adopted in its most recent round of reforms recommends itself highly to the Commission. The reform in question concerns the timing of counsel's submissions regarding costs. In Manitoba, parties are not normally required to address the appropriate level of costs until the proceeding has concluded. The disadvantage of this system is that the parties inevitably take positions regarding the appropriate level of costs that reflect the fact that they already know who will be required to pay whom (in the absence of an unusual order by the court).

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[20] P. Williams, et al., *Report of the Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Attorney-General's Department, 1998) at ¶3.2.

The new Ontario rules require parties to prepare submissions on costs *before* they know which party has been successful. At that point, in the words of one British Columbia court, "counsel are likely to be more candid in their views as to which scale the court should adopt".[21] The Commission considers this an extremely beneficial development and one which will work to moderate the parties' positions on costs, thus enabling the court to reach a more just and appropriate decision in each case.

The court obviously does not review the submissions prior to making its decision on the merits; the practice in Ottawa-Carleton (where the idea originated) was to file the submissions in sealed envelopes, to be opened by the court only once the decision on the merits had been made.[22] The Commission considers this an appropriate way to deal with such submissions.

Unlike Ontario, however, the parties need not put a great deal of time and effort into the preparation of their submissions. Given the fact that costs awards will normally be based on the Tariff, and the fact that every proceeding will have been assigned to a Class at its inception, submissions need only be directed to whether or not the Class should be changed (and why), or whether costs should be ordered on some basis other than the Tariff (*e.g.*, on a solicitor and client basis, parties to bear their own costs, or some other basis). This should require minimal additional time and expense, and provide the court with the parties' most candid submissions with respect to the appropriate level of costs.

This requirement is obviously not intended to restrict the court's ability to request further submissions from the parties on costs should it be desirable to do so. It is also intended to be sufficiently flexible so that, in the case of a lengthy trial, for example, the submissions could be made *after* the presentation of evidence was concluded, but *before* final argument.

RECOMMENDATION 7

Parties should be required to prepare and submit to the court, in sealed envelopes, any submissions they wish to make on costs* prior *to the hearing of the substantive matter, unless the court orders otherwise on application of the parties.

E. INTERLOCUTORY APPLICATIONS

Although Rule 57.03(1) makes it possible for the court to order the costs of an

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[21] *Ter Neuzen v. Korn*, [1992] 3 W.W.R. 469 at 475 (B.C.S.C.).

[22] County of Carleton Law Association, *Submission of the County of Carleton Law Association (Ottawa) in Response to the "Costs Grid Consultation Paper" of the Costs Sub-Committee of the Civil Rules Committee* (28 April 2004) at 4, online: <http://www.ccla.ottawa.on.ca/ccla_images/Costs_Grid_2004/Final_Submission_of_CCLA_to_Civil_Rules_Costs_rev_April_28_2004.doc> (date accessed: 10 August 2004).

interlocutory application payable forthwith, in fact (as discussed above) this jurisdiction is rarely exercised. This is unfortunate, as making costs payable forthwith can help to achieve the Commission's goal of discouraging improper or unnecessary interlocutory applications.

> [I]ssues and parts of actions are won and lost just as much as "events" are, ... often just as much is at stake in battles as in the war, and ... litigants and their lawyers need to be motivated to realize that bad points are likely to be very expensive ones.[23]

The comparable Ontario rule was amended in 2001 to require the court to order costs payable within 30 days of an interlocutory application unless "satisfied that a different order would be more just."[24] This was apparently introduced to deter frivolous motions and encourage litigants to think seriously before bringing motions.[25] Alberta amended its Rules in 1998 and 2000 similarly to require orders of costs on interlocutory applications to be made payable forthwith,[26] and this practice was recently endorsed by the Rules Project Costs Committee in that province.[27] This is also the practice in Nova Scotia, in part because of concern that the cost of interlocutory applications is "lost" by the time the entire proceeding is finally concluded, and in part because the judge hearing the interlocutory application is in the best position to fix the costs relating to it.[28]

The Commission considers that making costs awards for interlocutory matters payable forthwith should be the rule rather than the exception. This will advance the Commission's goal of discouraging improper or unnecessary steps in litigation. Although there are concerns that such a rule could work a hardship on parties with limited means, who might be discouraged from bringing meritorious applications, costs are always in the discretion of the court and such situations can be addressed on an individual basis. This proposal is in accordance with the recommendation of the Canadian Bar Association, which suggested:

> Lawyers and clients should be given a clear financial incentive to achieve early consensual settlement of their cases and, failing settlement, to work efficiently and in good faith through the case management and caseflow management systems outlined earlier. Parties and lawyers who do not operate in accordance with these principles, or who take special steps (absent compelling circumstances) to remove their cases from

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[23] Turriff, *supra* n. 4, 706.

[24] *Civil Procedure Rules*, R.R.O. 1990, Reg. 194, s. 57.03(1). The Rule was amended effective 1 January 2002: O. Reg. 284/01, s. 16.

[25] D. Hasselback, "New rule aims to curb frivolous litigation" *National Post* (6 March 2002) FP10, cited in Alberta Law Reform Institute, *supra* n. 6, at 19.

[26] Alta Reg. 269/1997, s. 14 and Alta. Reg. 152/2000, s. 11.

[27] Alberta Law Reform Institute, *supra* n. 6, at 18-20.

[28] W.A. Richardson, *A Running Commentary on Party and Party Costs and the Taxation of Legal Accounts in Nova Scotia*, at para. 101, online: <http://www.nsbs.ns.ca/resources/tax_accounts1.pdf> (date accessed: 26 March 2005).

assigned tracks and case management, should face substantial costs sanctions, generally payable immediately and in any event of the cause. ...

Every jurisdiction should develop a system of incentives and sanctions to encourage settlement and prudent use of court time. Among the options to consider ... [is] the following: ...

- as suggested earlier, assessing costs immediately following an interlocutory application and requiring immediate payment.[29]

RECOMMENDATION 8

Rule 57.03(1) should be amended to require the court to order the costs of an interlocutory application to be payable forthwith unless satisfied that a different order would be more just.

F. OVER INDEMNIFICATION

Because awards of costs are intended primarily as a mechanism to indemnify successful parties against the costs and expenses incurred to vindicate their legal rights, and not a means of punishing unsuccessful parties, there is widespread support for the principle that costs awards should not exceed the actual amount of costs and expenses incurred.[30] There are certain circumstances where this principle does not obtain; in particular, it does not apply when the provisions of Rule 49 relating to settlement offers apply. In addition, it does not apply where the successful party has obtained legal aid.[31] In light of the fact that the purposes of costs are no longer limited to indemnification,[32] it may be that there are other circumstances in which this principle ought not to apply. Specifically, the principle may have no, or limited, application to self-represented litigants and to litigants whose counsel is acting *pro bono* (charging no fee, or only a nominal fee).

1. Self-represented Litigants

Persons who represent themselves in legal proceedings were historically disadvantaged in that they risked paying their opponent's costs if unsuccessful but would not be entitled to a costs award (other than with respect to disbursements) if they were successful. That is probably

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[29] *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, *supra* n. 5, at 45-46.

[30] M.M. Orkin, *The Law of Costs*, 2d ed., looseleaf (1987) at ¶204.

[31] *The Legal Aid Services Society of Manitoba Act*, C.C.S.M. c. L105, ss. 17(6) and (11); *Dobson v. Kubera* (2002), 165 Man. R. (2d) 265 at 267 (Q.B.).

[32] See, *e.g.*, M. Burgess, "No Good Reason Not To: Awarding Costs to the Successful Unrepresented Litigant" (1998) 21 Adv. Q. 119 at 126.

no longer the law in Manitoba following the 2003 decision of Madam Justice Beard in *Kuny v. Beamish*. In that case, Madam Justice Beard stated the law to be as follows:

> After considering the current Manitoba legislation and the case law as it has been developing, I find that there has been a change in the common law of costs and that there is no longer a blanket prohibition against awarding costs, other than disbursements, to a self-represented litigant.[33]

By definition, a litigant who represents himself or herself does not incur the expense of hiring a lawyer, which traditionally was what a costs award was intended to defray (apart from the component referable to disbursements). Courts are reluctant to create a potential for self-represented litigants to profit from conducting litigation,[34] which could be seen as contrary to the goal of discouraging unnecessary litigation. Courts are increasingly recognizing, however, that self-represented litigants should nevertheless be entitled to compensation for the time and effort they have put into preparing and prosecuting their own case. The Ontario Court of Appeal stated in 1999:

> I would also add that self-represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. As the Chorley case, supra, recognized, all litigants suffer a loss of time through their involvement in the legal process. The self-represented litigant should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation, and that as a result, they incurred an opportunity cost by foregoing remunerative activity. As the early Chancery rule recognized, a self-represented lay litigant should receive only a "moderate" or" reasonable" allowance for the loss of time devoted to preparing and presenting the case. This excludes routine awards on a per diem basis to litigants who would ordinarily be in attendance at court in any event.[35]

Two years later, the Alberta Court of Appeal was less concerned with establishing whether, and precisely how much, the successful self-represented litigant had foregone potentially remunerative activity:

> When determining an appropriate costs award for a successful unrepresented litigant, courts should consider many factors, including the lost opportunities of the litigant as a result of self-representation. For the sake of expediency, proof of the exact value of that lost opportunity is not required (or we would be into trials about costs). Nonetheless, whether a person has lost time from work to represent themselves is a relevant factor to consider. If an unrepresented litigant was not otherwise employed, the fee portion of

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[33] *Kuny v. Beamish* (2003), 172 Man. R. (2d) 28 at 35-36 (Q.B.).

[34] See, *e.g.*, *Dechant v. The Law Society of Alberta* (2001), 203 D.L.R. (4th) 157 at 162 (Alta. C.A.).

[35] *Fong v. Chan* (1999), 181 D.L.R. (4th) 614 at 624 (Ont. C.A.).

> costs attributable to lost opportunity may not exist or, at a minimum, would be significantly less than a person who has suffered a loss of income due to employment absences.[36]

This was the approach adopted by Beard J. in *Kuny v. Beamish*, who held that "while one factor to be considered in setting the appropriate amount of costs is whether the self-represented litigant has suffered a lost opportunity to earn income, this is only one factor to be considered...."[37]

In British Columbia, the Court of Appeal has held that while the awarding of costs is always in the discretion of the court, the starting point for an award of costs to a self-represented litigant should be the amount set out in the tariff. The tariff represents only a partial indemnity in any event, and is sufficiently flexible so that the court or the registrar can ensure that the self-represented litigant is not over-compensated.[38] Others have suggested that self-represented litigants should simply be entitled to the tariff amounts.[39]

The question arises whether the Rules should expressly provide that costs are payable to self-represented litigants and, if so, whether they should set out on what basis those costs should be calculated. In the opinion of the Commission, it would be helpful to make it clear that costs are indeed payable by including such a provision in the Rules. This has been done in Ontario as part of the recent Rules revision: Rule 57.01(4) (equivalent to Manitoba's Rule 57.01(6)) has been amended to provide that nothing in the Rule "affects the authority of the court ... to award costs to an unrepresented party".[40]

The Commission is not persuaded, however, that it is necessary or desirable to introduce specific guidelines for the exercise of the court's discretion when awarding such costs. The guiding principles are evolving on a case by case basis and it would be preferable for the courts to continue to craft them in the context of specific fact patterns rather than attempt to lay down rigid rules that will not be appropriate for every circumstance. This is consistent with the approach recently adopted by the Alberta Rules of Court Project Steering Committee.[41]

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[36] *Dechant v. The Law Society of Alberta*, *supra* n. 34, at 165.

[37] *Kuny v. Beamish*, *supra* n. 33, at 36.

[38] *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 at 340 (B.C.C.A.).

[39] M. Burgess, "No Good Reason Not To: Awarding Costs to the Successful Unrepresented Litigant" (1998) 21 Adv. Q. 119 at 126-27.

[40] O. Reg. 42/05, s. 4(2).

[41] Alberta Law Reform Institute, *Alberta Rules of Court Project: Self-Represented Litigants* (Consultation Memorandum #12.18, 2005).

RECOMMENDATION 9

Rule 57.01(6) should be amended to provide expressly that the court may award costs to a person who is not represented by counsel.

2. *Pro Bono* Litigation

A second situation to which the indemnity principle *may* not apply is where a party's lawyer is acting *pro bono*.[42] Canadian lawyers are routinely urged to act *pro bono* for parties with limited means,[43] a practice which permits access to justice for persons who might otherwise be unable to pursue their legal rights.

As with the self-represented litigant, the party whose counsel is acting *pro bono* does not actually incur any legal fees for which they would normally be entitled to indemnification.[44] Courts in some provinces, however, have recognized that the relegation of the indemnification principle to merely one of a number of purposes to be achieved by costs rules means that the mere fact that a party's lawyer is acting *pro bono* ought not automatically to disentitle that party to an award of costs. This has occurred primarily in the context of constitutional litigation, where the courts have recognized that it is particularly important to encourage lawyers to undertake *pro bono* work on behalf of impecunious litigants:

> *Charter* litigants, particularly those seeking their equality rights under S. 15 are often disadvantaged, poor, members of powerless groups in society, disabled, or a combination of several of these categories. In this case, Mr. Broomer is visually impaired. Mr. Beauparlant suffers from manic depression, obsessive compulsive disorder, and Crohn's Disease. Mr. Broomer, Ms. Duke and their spouses have three small children each. All applicants are struggling to feed, clothe, and provide the necessities of life for themselves and their families. None, obviously, is in any position to fund a *Charter* application of this nature. The only way their *Charter* challenge to the legislation at issue could proceed was through the pro bono intervention of lawyers experienced in this area of law. It is therefore appropriate to award costs to lawyers acting in this capacity in order to encourage them to continue taking on cases of this nature. Their continued participation in pro bono work ensures that disadvantaged citizens, such as these applicants, receive access to justice.[45]

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[42] *Pro bono publico* is a Latin term meaning "for the public good". "*Pro bono*" is used to describe legal services provided by lawyers at no charge, or at a nominal charge, for parties whose financial means are limited.

[43] See, *e.g.*: Canadian Bar Association Resolution 98-01-A, adopted by CBA Council at the 1998 Annual Meeting; J. C. Major, (1994) 28 Law Society Gazette 101; Pacer Enterprises Ltd. v. Cummings, [2004] 8 W.W.R. 110 at 115 (Alta. C.A.).

[44] *Vickers v. Vickers* (2001), 201 D.L.R. (4th) 65 at 75 (N.S.C.A.).

[45] *Broomer (Litigation Guardian of) v. Ontario (Attorney General)* (2004), 187 O.A.C. 192 at 196-197 (Ont. C.A.).

In other circumstances as well, courts have recognized the value of *pro bono* representation, and have declined to reduce the amount of costs payable under the tariff to prevent over-indemnification.[46] It should be noted also that costs are still payable by *pro bono* litigants who have been unsuccessful.

The Commission has considered the question of whether there ought to be express provision that parties represented by counsel acting *pro bono* are entitled not to have their entitlement to costs limited or reduced solely on that basis. The relevant law is unclear and would benefit from legislative clarity. Such a provision would encourage counsel to take on meritorious cases on behalf of persons who are unable to pay their fees without assistance, and could be seen as complementing section 55 of *The Legal Profession Act*[47] (which permits lawyers to enter into contingency agreements with their clients).

The Commission sees no compelling reason *not* to include such a provision and, given the potential beneficial effect, considers that such a provision is indeed desirable. Section 96(2) of *The Court of Queen's Bench Act* currently makes precisely such a provision with respect to parties who are represented by a lawyer who happens to be an employee of the party and could readily be expanded to cover parties whose counsel is acting *pro bono*.[48] It should be noted that the Commission is not making any recommendation with respect to an unsuccessful *pro bono* litigant's liability for the costs of opposing parties.

RECOMMENDATION 10

Section 96(2) of* The Court of Queen's Bench Act *should be amended to provide expressly that the court shall not disallow or reduce an award of costs by reason of the fact that a party was represented by counsel acting on a* pro bono *basis.

G. PERIODIC ADJUSTMENT OF TARIFF AMOUNTS

One of the difficulties with a tariff system of costs, alluded to above, is that over time the amounts stipulated in the tariff become less and less closely aligned with litigants' actual legal costs. As a result, the tariff increasingly indemnifies litigants to a lesser and lesser extent. In Ontario, for some years before the 2002 rules revisions, the tariff introduced in 1985 "was almost

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[46] *MacFarlane v. British Columbia (Minister of Transportation & Highways)*, [1994] B.C.J. No. 3173 at para. 5 (S.C.Q.L.) See also *Vysek v. Nova Gas International Ltd.* (2001), 298 A.R. 253 at paras. 283-294. (A.B.Q.B.)

[47] *The Legal Profession Act*, C.C.S.M. c. L107, s. 55.

[48] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 96(2).

never used as it offered no practical guidance as to appropriate fees".[49] To the extent that achieving a reasonable level of indemnification is a desirable goal, this result is highly undesirable.

At present, there is no mechanism for reviewing and revising the amounts in the Tariff. The Commission considers that such a mechanism is essential in order to ensure the continued relevance and utility of the Tariff. The Alberta Rules of Court Project is also considering the problem of how to keep that Province's tariff current; the options it has identified, without yet settling on a preferred option, include: tying the tariff to inflationary factors identified in the *Judgment Interest Act*; amending the tariff annually to reflect inflation; setting an annual inflationary factor by Regulation; and leaving inflation in the discretion of the courts.[50]

The Commission believes that the best option for keeping the Tariff current is to require a body with representation from the courts and the Bar to review the Tariff amounts regularly and recommend changes when they become necessary. In Nova Scotia, a Costs and Fees Committee established by the *Costs and Fees Act*[51] has responsibility for setting the amounts in the tariff, but it has only revised the tariff once since it was introduced in 1989,[52] and it only meets when an issue demands its attention. There have been many years when it did not meet at all.[53] It seems to the Commission that more regular revision of the Tariff would be preferable to avoid the need for dramatic amendments at lengthy intervals.

In Australia, the Federal Costs Advisory Committee holds a public inquiry annually into costs allowable to solicitors in the federal courts and may make recommendations to the courts for changes to the scales.[54] Such an annual review is probably both adequate and necessary.

The question that arises is what body should be given the task of maintaining the currency of the Tariff. The Commission considers the best option to be the Statutory Rules Committee, created by *The Court of Queen's Bench Act*.[55] That Committee already has jurisdiction, under section 92(v) of the Act, to make rules in relation to costs; all that is necessary is to require the Committee to report regularly on the Tariff and whether amendments to it are necessary or

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[49] R.D. Malen, "The New Costs Rules: Theory Versus Practice" (2004) 28 Adv. Q. 432 at 432, n. 2.

[50] Alberta Law Reform Institute, *supra* n. 6, at 15.

[51] *Costs and Fees Act*, R.S.N.S. 1989, c. 104, s. 2.

[52] *In the Matter of Party and Party Fee Tariffs*, *supra* n. 17.

[53] E-mail from D. Pink, Executive Director, Nova Scotia Barristers' Society, to J. Penner (14 May 2005).

[54] Austalia, Attorney-General's Department, Federal Costs Advisory Committee, on line: <http://www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/Page/Justice_and_Administrative_Law_Federal_Costs_Advisory_Committee> (date accessed: 13 March 2005).

[55] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 91.

desirable. In fulfilling this requirement, the Committee would be expected to consult with the legal profession and others, as required, and to engage whatever expert assistance it considers necessary to ascertain with accuracy the degree to which the Tariff has ceased to provide for an appropriate level of indemnification.

RECOMMENDATION 11

The Statutory Rules Committee should be required to report to the Minister of Justice annually or on a regular basis to advise whether adjustments to any or all of the Tariff amounts are necessary or desirable in order to continue to provide an appropriate level of indemnification to successful litigants.

The Alberta Rules Project Costs Committee expressed some concern that, because much litigation takes place over a significant period of time, there may be some unfairness inherent in awarding costs on the basis of a tariff that is higher than the one that was in place at the time particular steps in the litigation were taken.[56] The Commission is not troubled by this prospect, however, for two reasons. First, if a party has incurred an expense that is not reimbursed until years later, that party has been out of pocket for that length of time and has incurred or forgone interest on that amount. If the Tariff has increased in the intervening period, that likely means that the tariff value represents the present value of the expense when it was incurred.

The second reason the Commission considers that increases in the Tariff during the course of litigation is not problematic is linked to Recommendation 8: if it is accepted, many of the costs incurred will become payable forthwith, so that changes in the Tariff will not be relevant. The Commission therefore does not feel that any provision is necessary to address the retroactive effect of changes to the Tariff.

H. COSTS ON SOLICITOR AND CLIENT BASIS

As set out in Chapter 3, neither *The Court of Queen's Bench Act* nor the Rules currently expressly describe the jurisdiction to make awards of costs on a solicitor and client basis, although there is no doubt that the court does have such a jurisdiction.[57] The Commission was asked by the Statutory Rules Committee to consider whether it would be desirable to provide expressly for such awards, or whether it would be preferable to replace them with something like "increased costs" or "substantial indemnity" costs.

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[56] Alberta Law Reform Institute, *supra* n. 6, at 15.

[57] *Bjorninen v. Mercredi* (1984), 6 D.L.R. (4th) 241 at 243 (Man. C.A.), citing *Foulis v. Robinson* (1978), 92 D.L.R. (3d) 134 (Ont.C.A.).

1. Replace With "Increased" or "Substantial Indemnity" Costs?

Although the court's jurisdiction to make awards of costs on a solicitor and client basis is undoubted, it flows entirely from the inherent jurisdiction of the court and section 96 of *The Court of Queen's Bench Act*. Is there a need to codify the jurisdiction in some way, as has been done in British Columbia and (more recently) Ontario?

In British Columbia, Rule 57(1) provides that costs are to be assessed according to the tariff, "unless the court orders that they be assessed as special costs".[58] "Special costs" have been described as "the equivalent of, and designed to replace, the former award of solicitor and client costs".[59] The Rules do not describe or restrict the circumstances in which such an order of costs may be made; they only list the factors that should be taken into account by the registrar when calculating the amount payable.[60]

As discussed in Chapter 3, between 1990 and 2002 British Columbia had provision for a scale of costs somewhere between the party and party scale and the solicitor and client scale, termed "increased" costs. Its application was found, however, to be too uncertain and it was subsequently abolished.

Before 2002 Ontario, like Manitoba, had no express legislative reference to the awarding of costs on a solicitor and client basis. When the "costs grid" was brought into force, however, the jurisdiction to award costs on a "substantial indemnity basis" was introduced[61] with the intention that it would replace awards of costs on the old solicitor and client basis.[62] Under the new rules (introduced in 2005), "substantial indemnity costs" are simply 150% of "partial indemnity" (or party and party) costs and the court has express jurisdiction to award "full indemnity" costs – equivalent to costs on a solicitor and client basis.[63] This system is too new to know how it will be interpreted or applied by the courts.

The Commission sees no particular benefit in adopting, either in the Rules or in *The Court of Queen's Bench Act*, some "middle ground" between party and party costs and costs on a solicitor and client scale. If the Tariff adequately compensates successful parties in the ordinary course, and if solicitor and client costs are available in appropriate circumstances, it seems to the

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[58] *Rules of Court*, B.C. Reg. 221/90, Rule 57(1).

[59] *Fullerton v. Matsqui (District)* (1992) 12 C.P.C. (3d) 310 at 315-316 para. 15 (B.C.C.A.) per Cumming J.A..

[60] *Rules of Court*, B.C. Reg. 221/90, Rule 57(3).

[61] O. Reg. 284/01.

[62] P.M. Perell, "Ontario's Costs Grid – Questions and Answers" (2002) 25 Adv. Q. 511 at 512; *Delrina Corp. v. Triolet Systems Inc.* (2002), 165 O.A.C. 160 at 163 (C.A.).

[63] O. Reg. 42/05, ss. 1, 4.

Commission that stipulating a third scale of costs is simply an invitation to uncertainty and further litigation over costs, as occurred in British Columbia. This would do nothing to further the Commission's key goal of simplicity and clarity.

In coming to this conclusion, the Commission is not ignoring the fact that the court has an existing discretion to make whatever order with respect to costs it considers just, including an order of costs that is greater than the Tariff amount but less than full solicitor and client costs.[64] The Commission sees no benefit in attempting to further codify this discretion, or the circumstances in which it ought to be exercised. Nor does the Commission consider it desirable to limit or restrict the discretion in any way. It does not appear to have given rise to an inordinate amount of litigation, and is an important component of the flexibility which the Commission identified as one of the goals of the costs rules.

If there is to be no statutorily-defined "middle ground," however, the Commission sees no need for further codification or to describe the jurisdiction to award costs on a solicitor and client basis. As its existence is beyond doubt, codifying it is not necessary to make that point clear.

RECOMMENDATION 12

There is no need to provide expressly the jurisdiction to award costs on a solicitor and client basis.

2. Stipulation of Criteria in Rules

Even if there is no need to identify expressly the court's jurisdiction to award solicitor and client costs, would it be desirable to stipulate the circumstances under which such costs ought to be awarded? The existing case law suggests merely that they ought to be awarded "only in rare and exceptional cases" where a party's conduct is "truly reprehensible, scandalous or outrageous".[65] While this leaves plenty of room for the exercise of discretion by trial judges, it is the Commission's view that such flexibility is desirable. There are simply too many possible circumstances in which an award of solicitor and client costs may be appropriate for any more precise rule. The current version of the leading text on costs devotes no fewer than 31 pages to describing the principles applicable to such costs awards and providing examples of cases in which such orders have been made.[66]

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[64] See, *e.g.*, *Seshia v. Health Sciences Centre*, 2003 MBCA 26, *MacDonald Estate v. Martin* (1994), 100 Man. R. (2d) 1 (*sub nom. MacDonald Estate, Re*) (C.A.); *Jepson v. Westfair Foods Ltd.* (1990), 65 D.L.R. (4th) 615 (Man. C.A.).

[65] *Brown & Root Services Corp. v. Aerotech Herman Nelson Inc.* (2004), 184 Man. R. (2d) 188 at 217 (C.A.) per Scott C.J.M. and Steel J.A.

[66] Orkin, *supra* n. 30, at ¶219.1.

RECOMMENDATION 13

There is no need to stipulate expressly the circumstances under which the jurisdiction to award costs on a solicitor and client basis may be exercised.

3. Assessment

The Statutory Rules Committee asked the Commission whether there might be a better way of *assessing* costs once they have been awarded on a solicitor and client basis. One difficulty identified by the Committee was determining whether, in a given case, the number of hours for which indemnification is claimed were actually necessary, and the suggestion was proffered that some sort of a tariff might be preferable.[67]

A tariff approach to solicitor and client costs would only make sense in the context of a system such as that found in Germany, or formerly in Alberta,[68] England[69] and other jurisdictions[70] where lawyers are limited to charging their clients the fees set out in the tariff, so that an award of the tariff amounts would completely, or nearly completely, indemnify the successful litigant.

Traditionally, an award of solicitor and client costs has been intended to indemnify the recipient for all reasonable expenses, reasonably incurred, necessary to bring (or defend) the proceeding. As already noted, there is some vagueness and flexibility in this principle, which means that assessing the extent of those reasonable expenses can consume a substantial amount of judicial time. This is undoubtedly one reason why the Statutory Rules Committee would prefer a more certain method of calculating solicitor and client costs.

The traditional position has been that costs awards may not exceed the successful party's actual costs.

> The Ontario Court of Appeal has stated clearly that a litigant cannot seek or receive an award of costs in excess of those amounts actually charged to it for conducting the litigation. Since a fundamental purpose of costs is to act as an indemnity to the successful party for legal expenses incurred, it follows that costs cannot exceed the

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[67]Memorandum from Mr. Justice G.O. Jewers, Chairperson, Statutory Rules Committee, Manitoba Court of Queen's Bench,(23 February 2004).

[68]Spink, *supra* n. 9, at 55-56.

[69]A.L. Goodhart, "Costs" (1929) 38 Yale L.J. 849 at 856-58.

[70]See, e.g. Spink, *supra* n. 9, at 16-17 and 42.

amount of the obligation.[71]

To the extent that over-indemnification is to be prevented, the courts may not award costs that exceed actual expenses incurred. A tariff would therefore be inappropriate because it would either over- or under-indemnify the successful litigant in virtually every case.

Courts have recognized in recent years, however, that costs awards are intended to achieve more than merely indemnification. For example, costs awards are also intended to deter frivolous or vexatious litigation and to express the court's disapproval of a party's improper behaviour.[72] The Supreme Court of Canada recently recognized the many ways in which costs awards are used to implement various policies by the courts:

> As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, *e.g.*, Supreme Court of British Columbia *Rules of Court*, Rule 37(23-26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.[73]

It has been held in British Columbia that, because costs on a solicitor and client basis are awarded to express the court's disapproval of a party's conduct, the principle of indemnification does not necessarily apply, such that the amount awarded may properly exceed the receiving party's actual liability for legal fees.[74]

In light of this evolving view of the purposes of costs awards, it seems to the Commission that a tariff may well be an appropriate tool for assessing costs that have been awarded on a solicitor and client basis to the extent that they are awarded (as noted above) in rare and exceptional cases where a party's conduct is truly reprehensible or outrageous. Under such circumstances, concerns about over-indemnification may properly give way to the principle of punishing wrongdoing.

The traditional calculation of solicitor and client costs awards must continue, of course,

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[71] Orkin, *supra* n. 30, at 201.

[72] *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 at 339 (B.C.C.A.), cited in *Waldron v. Kist* (2003), 175 Man. R. (2d) 41 at 43 (Q.B.) per Master Harrison.

[73] *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2003), 233 D.L.R. (4th) 577 at 591 (S.C.C.) per LeBel J.

[74] *Fullerton v. Matsqui*, *supra* n. 60.

in circumstances in which costs are awarded on a solicitor and client basis for reasons other than punishment or denunciation of a party's behaviour. This can arise, for example, where a contract specifically provides for the indemnification of one party by the other,[75] in certain types of litigation involving estates,[76] and where a trustee is entitled to indemnification with respect to all reasonable costs and expenses incurred *qua* trustee.[77] In situations such as those, there is no reason to alter the established practice of determining the actual reasonable expenses with respect to which the party is entitled to indemnification.

Queen's Bench Rule 49 provides an example of a provision that ignores concerns regarding over-indemnification. Under that rule, where a defendant has rejected a settlement offer that turns out to have been better (from the defendant's point of view) than the result the plaintiff achieves at trial, the defendant must pay double party and party costs from the date of the offer.[78] (Where a plaintiff rejects a defendant's offer but fails to do better than the offer at trial, the plaintiff is liable to pay the defendant's costs from the date of the offer despite having been the successful party.)

The Commission is persuaded that a similar provision for the calculation of solicitor and clients costs would be appropriate. On the rare occasion where the court finds that an award of solicitor and client costs is appropriate, the offending party should be required to pay costs that are calculated on the basis of double the normal tariff. This will assist in achieving the Commission's goal of discouraging inappropriate behaviour by litigants; it will also assist in achieving the goal of simplicity and clarity.

RECOMMENDATION 14

Solicitor and client costs that are awarded to denounce a party's reprehensible, scandalous or outrageous behaviour should be assessed as double the party and party costs that would be payable under the Tariff.

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[75] *Metropolitan Stores of Canada Ltd. v. Unigraphics Manitoba Ltd.* (1999), 136 Man. R. (2d) 299 (Q.B.).

[76] *Public Trustee v. Ballen* (1992), 87 D.L.R. (4th) 111 (Man. C.A.).

[77] *Re Agritrans Logistics Ltd.*, 2005 MBCA 68 at para. 32.

[78] *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 49(10).

CHAPTER 6

LIST OF RECOMMENDATIONS

1. The default rule should continue to be that a successful party is entitled to an award of costs to indemnify him or her partially against costs incurred. (p. 31)

2. Counsel fees payable should continue to be calculated on the basis of a tariff. (p. 32)

3. The tariff should be designed to provide indemnification of approximately 60% of reasonable counsel fees in a typical case. (p. 33)

4. There should be six classes in the tariff. (p. 35)

5. Proceedings should be assigned to Classes on the basis of their relative degree of difficulty and/or importance, rather than the amount of money in issue. (p. 35)

6. Parties should be required to indicate, at or near the time that they file their first pleading, what Class they believe the matter should be assigned to. If the parties are unable to agree, the court should assign the matter to the appropriate Class after hearing from the parties. (p. 36)

7. Parties should be required to prepare and submit to the court, in sealed envelopes, any submissions they wish to make on costs *prior* to the hearing of the substantive matter unless the court orders otherwise on application of the parties. (p. 37)

8. Rule 57.03(1) should be amended to require the court to order the costs of an interlocutory application to be payable forthwith unless satisfied that a different order would be more just. (p. 39)

9. Rule 57.01(6) should be amended to provide expressly that the court may award costs to a person who is not represented by counsel. (p. 42)

10. Section 96(2) of *The Court of Queen's Bench Act* should be amended to provide expressly that the court shall not disallow or reduce an award of costs by reason of the fact that a party was represented by counsel acting on a *pro bono* basis. (p. 43)

11. The Statutory Rules Committee should be required to report to the Minister of Justice annually or on a regular basis to advise whether adjustments to any or all of the Tariff amounts are necessary or desirable in order to continue to provide an appropriate level of indemnification to successful litigants. (p. 45)

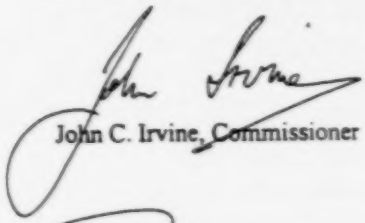
12. There is no need to provide expressly the jurisdiction to award costs on a solicitor and client basis. (p. 47)

13. There is no need to stipulate expressly the circumstances under which the jurisdiction to award costs on a solicitor and client basis may be exercised. (p. 48)

14. Solicitor and client costs that are awarded to denounce a party's reprehensible, scandalous, or outrageous behaviour should be assessed as double the party and party costs that would be payable under the Tariff. (p. 50)

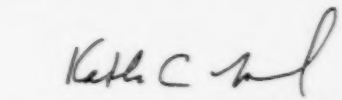
This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 13th day of September 2005.

Clifford H.C. Edwards, President

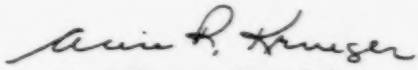


John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner



Kathleen C. Murphy, Commissioner



Alice R. Krueger, Commissioner

REPORT ON
COSTS AWARDS IN CIVIL LITIGATION

EXECUTIVE SUMMARY

A. INTRODUCTION

In February of 2004, the Court of Queen's Bench Statutory Rules Committee invited the Manitoba Law Reform Commission to undertake a study of the law relating to costs orders in civil proceedings. This Report is the result of that invitation. The Report's focus is relatively narrow: it considers the fundamental basis of the existing costs regime in Manitoba, and compares it with regimes in other jurisdictions, to assess whether reform is necessary to ensure that the rules best achieve the purposes for which they are intended. As well, it reviews the common law rules relating to costs awards to self-represented litigants in order to determine whether a legislated regime with respect to such costs is desirable.

B. PURPOSES OF COSTS

The basic "costs" rule in Manitoba, as in all other Canadian jurisdictions, is that a successful litigant is entitled to be reimbursed by the unsuccessful party for some portion of the expenses he or she incurred in vindicating his or her position in court. Although the rule itself is relatively well understood, there is not a clear rationale for it – or, to be more precise, there are a number of possible explanations offered for the rule that are not consistent with each other. In general, however, it is considered fair that a successful party should be "made whole" by the party whose position has been shown to be unmeritorious, and it is also believed that the rule will discourage frivolous and unmeritorious litigation.

The Commission's position is that there are six broad goals – not all mutually compatible – that costs rules ought to strive to achieve. The first goal is indemnification: successful litigants ought to be at least partially indemnified against their legal costs. The second is deterrence: potential litigants should be encouraged to think carefully before engaging the civil justice system to achieve their goals and should also be encouraged to refrain from taking unnecessary steps within that system.

The third goal is to make costs rules easy to understand and simple to apply. The fourth is to encourage early settlement of disputes, and the fifth is to facilitate access to justice. The sixth and final goal the Commission considers important is flexibility: the rules must allow judges to ensure that justice is done in particular cases.

In this Report, the Commission has attempted to balance these various goals and to

achieve as many of them as realistically possible while still obtaining the best overall result.

C. EXISTING COSTS REGIME

In Manitoba, *The Court of Queen's Bench Act* provides that costs are in the discretion of the court. The *Queen's Bench Rules* deal with the award and fixing of costs and set out the factors that the court may consider in the fixing of costs. These include the amount in issue, the complexity of the litigation, the importance of the issues, the conduct of the parties, and so forth. Generally speaking, a successful party will be entitled to an order of costs against an unsuccessful party, but costs are always in the discretion of the court.

Tariff A to the *Court of Queen's Bench Rules* governs the amounts of the costs to be awarded as between party and party, which are almost always substantially less than the actual amount of expenses incurred. In addition, the Rules provide for an award of double the tariff amounts (or for an award to an otherwise unsuccessful party) in situations where a party has made a settlement offer that is more generous than the result actually obtained at trial.

Tariff A divides all proceedings into four classes (Class I, Class II, Class III, and Class IV), generally according to the amount in issue, and then block fees are awarded under each step in the proceeding. The amount payable with respect to any given step varies depending on the amount in issue in the proceeding; these amounts have remained essentially unchanged since 1989. Where what is in issue is not an amount of money, the court may award costs based on whichever class is, in the court's discretion, "just".

While there is no data available on what proportion of actual costs are typically defrayed by a costs award based on the Tariff, it is variously estimated that the proportion is less than 50%, no more than 25%, and even on occasion as little as 10% of actual costs.

The Rules do not attempt to define awards of costs on a "solicitor and client" basis, which in essence require a party to pay approximately the actual amount of the fees that the other party has had to pay. Such awards are generally made only in rare and exceptional circumstances, such as in order to condemn scandalous conduct by a litigant.

Historically, a person who represented himself or herself successfully in court was not entitled to an award of costs, other than disbursements that had been properly incurred. That rule has been questioned in the appellate courts of several Canadian jurisdictions in recent years, and is no longer generally applicable. However, the law in Manitoba remains unsettled.

D. OTHER JURISDICTIONS

The Commission has considered the costs rules that are employed in Ontario, British

Columbia, New Brunswick and Nova Scotia. The courts in Ontario and British Columbia have, in recent years, undertaken significant reforms of their costs regimes. The changes have not been without controversy, and change continues to occur in response to some of the sharper criticisms. The reforms have not, however, altered the fundamental "loser pays" principle. New Brunswick and, later, Nova Scotia adopted a costs regime that is different in some significant ways from those of the other Canadian jurisdictions examined, but one still based on "loser pays".

We have also looked abroad to the examples offered by other jurisdictions, particularly those that have undergone or considered reform in recent years. England dramatically revised its costs system, which is similar in principle to the Canadian system, to penalize parties who incur unnecessary or excessive costs in pursuing litigation. Australia's civil costs rules, and New Zealand's, offer some lessons as well. Germany is an example of a civil law jurisdiction that employs a more complete "loser pays" system than any common law jurisdiction.

Although the "loser pays" system tends to seem obvious and just to lawyers trained in the Canadian system, it is far from being the only one considered to be such. Our neighbours to the south, in the United States, take as their starting point the proposition that "fee shifting" (their term for costs awards) should only take place under exceptional circumstances, and the "normal" rule is that all parties bear their own costs.

E. PROPOSED REFORMS

With respect to the six goals identified by the Commission that costs rules should attempt to achieve, it appears that Manitoba's existing costs rules are notably inadequate.

Regarding *indemnification*, it seems clear that the existing Tariff does an inadequate job of defraying the actual costs of successful litigants. The Commission also believes that reform is necessary to ensure that the costs rules provide a greater *deterrent* to frivolous actions and defences, and recommends reform to discourage, improper or unnecessary steps in litigation more effectively. Helping parties to appreciate the actual costs of litigation will assist in this respect and will also *encourage settlement* which is not always achieved under the present rules.

On the other hand, the Commission considers the existing costs rules to be relatively *easy to understand and simple to apply* – that is, in fact, one of their greatest strengths and a highly desirable feature of the current rules. As well, in the Commission's opinion the costs rules do not *impede access to the courts inappropriately*. On this point, the Commission considers it important to note that costs rules can only ever be a *part* of the solution to the problem of access to justice and must be considered as complementary to procedural controls, case management systems and other initiatives.

The judges of the Court of Queen's Bench have a reasonable amount of *flexibility* within the current system; the Commission does not believe that that flexibility needs to be significantly

expanded or constricted, although it believes that the framework within which it is exercised *does* need reform.

Specific Recommendations

The threshold question for the Commission was whether there is any reason to change the basis of the present costs regime, *i.e.*, the presumption that a successful litigant is entitled to have some portion, but not all, of their expenses (including legal fees) defrayed by the unsuccessful party or parties. On balance, the Commission sees no need to change this default rule.

The next fundamental issue for the Commission was how to determine the level of counsel fees to be awarded under the costs rules. The alternative to a tariff system is to base the award on the actual costs incurred by the successful party, as is done in Ontario, England and the United States. While there would be an increase in the accuracy of the level of indemnification in individual cases, the Commission considers that the loss of simplicity and clarity of a tariff system would be too great a price to pay. It is apparent from the experience of England and Ontario that Manitoba could expect an increase of litigation on costs and considerable demands on scarce judicial resources.

If indemnity is to be something less than complete indemnity, what is an *appropriate* level of indemnity? This again varies among jurisdictions, from as little as 30% to as high as 90% of actual expenses incurred. The Commission considers that indemnification of approximately 60% of reasonable costs is adequate and appropriate.

The Commission considered the design of the tariff system and decided that the number of classes should be increased from four to six, and that the classes should be based on the relative importance and difficulty of cases rather than simply the dollar amount involved. In order to minimize the uncertainty that this latter change could introduce, the Commission recommends that cases be assigned to a class at a very early stage, either by agreement of the parties or, if there is no agreement, by the court.

The probability of the court awarding an appropriate amount of costs in each case would be improved by the adoption of one of the recent Ontario reforms: requiring parties to make submissions on costs *before* they know who has been successful.

The current Rules permit judges to make costs awards on interlocutory matters that are payable forthwith but, in practice, such orders are made only rarely. The Commission recommends that such orders be made the norm to provide an additional incentive to settlement and to discourage frivolous or unmeritorious interlocutory applications.

It has traditionally been considered an important principle that parties should not be "over-compensated". That is, an award of costs should not (except in very special circumstances) be

greater than the actual expenses incurred by the party receiving the award. Over the past decade or two, however, the courts have recognized that costs serve a number of functions and the restrictions on over-compensation are loosening. There are two areas in particular where these restrictions, in the Commission's opinion, ought to be dispensed with.

The first area is that of self-represented litigants who are seen more and more often in the courts. Historically, such litigants were not entitled to any award of costs since they had, by definition, not incurred any legal expenses. The courts in other provinces have awarded costs to self-represented litigants and the Commission recommends that their entitlement be expressly recognized by the Manitoba Rules.

The second area in which over-compensation has arisen as an issue is *pro bono* litigation, where a lawyer acts on behalf of a client without charging a fee. The Commission recommends that *The Court of Queen's Bench Act* be amended to stipulate that a party is not disentitled to costs merely because his or her lawyer is acting on a *pro bono* basis.

A significant disadvantage of using a tariff system to determine the amount of costs payable is that, over time, it tends to become disconnected from the real costs of litigation. In order to prevent such a fate overtaking the revised Tariff, the Commission recommends that the Statutory Rules Committee be required to report to the Minister of Justice annually as to whether adjustments of the Tariff amounts are necessary.

The final matter considered by the Commission is "solicitor and client" costs, which are awarded by the court to express disapproval of "reprehensible, scandalous, or outrageous conduct" in the course of litigation. The Commission sees no need to codify the jurisdiction to award such costs, which is undoubted, nor does it consider it necessary to codify the basis on which they ought to be awarded. It does see merit, however, in simplifying the assessment of such costs by stipulating that they shall simply be double the otherwise applicable tariff amount. In such cases, the goal of preventing over-compensation may legitimately give way to the goal of punishing the type of behaviour that calls for an award of such costs.

RAPPORT SUR L'ADJUDICATION DES DÉPENS DANS UN LITIGE CIVIL

RÉSUMÉ

A. INTRODUCTION

En 2004, le Comité des règles de la Cour du Banc de la Reine a invité la Commission de réforme du droit du Manitoba à entreprendre une étude des dispositions législatives sur les ordonnances de dépens dans des procédures civiles. Le présent rapport fait suite à cette invitation. Il porte sur des points précis : on y relève les principaux fondements du régime actuel de dépens, on y compare le régime manitobain avec le régime d'autres provinces et États, dans le but de préciser s'il est nécessaire de procéder à une réforme pour que les règles atteignent les objectifs pour lesquels elles ont été établies. De plus, on y examine les règles de la *common law* relatives à l'adjudication des dépens aux parties qui se représentent elles-mêmes afin de déterminer le besoin de dispositions législatives à cet effet.

B. OBJECTIFS DES DÉPENS

Au Manitoba, comme dans tous les ressorts du Canada, la règle de base des dépens veut que la partie gagnante ait droit à un remboursement versé par la partie qui n'a pas eu gain de cause d'une part des frais engagés pour défendre sa position devant le tribunal. Même si la règle en elle-même est plutôt facile à comprendre, elle ne repose pas sur un seul fondement, mais bien sur plusieurs, dont certains entrent en contradiction les uns avec les autres. Toutefois, de manière générale, il est considéré juste que la partie gagnante soit indemnisée par la partie perdante, tout comme on admet que cette règle dissuade les litiges frivoles et non fondés.

La Commission estime que les règles sur les dépens doivent poursuivre six objectifs principaux, qui ne sont pas tous compatibles entre eux. Le premier objectif est l'indemnisation : les parties gagnantes doivent être au moins partiellement indemnisées de leurs frais juridiques. Le deuxième objectif est la dissuasion : les règles devraient pousser les parties potentielles à réfléchir sérieusement avant d'avoir recours aux tribunaux pour atteindre leurs buts et devraient également inciter les parties à éviter de prendre des mesures superflues.

Le troisième objectif est de faire en sorte que les règles sur les dépens soient faciles à comprendre et à appliquer. Le quatrième objectif est de favoriser un règlement rapide des litiges et le cinquième, de faciliter l'accès à la justice. Enfin, le sixième et dernier objectif prioritaire de la Commission est la souplesse : les règles doivent permettre aux juges d'administrer la justice dans des cas particuliers.

Dans le présent rapport, la Commission a tenté de trouver un équilibre entre ces divers

objectifs et d'atteindre le plus grand nombre possible d'entre eux d'une façon réaliste, tout en obtenant le meilleur résultat d'ensemble possible.

C. LE RÉGIME DE DÉPENS ACTUEL

Au Manitoba, la *Loi sur la Cour du Banc de la Reine* établit que les dépens sont à la discrétion du tribunal. Ce sont les *Règles de la Cour du Banc de la Reine* qui traitent de l'adjudication et de la fixation des dépens et qui précisent les facteurs que le tribunal doit prendre en considération au moment de les adjuger. Le tribunal doit notamment tenir compte du montant en cause, de la complexité du litige, de l'importance des questions en litige, de la conduite des parties, etc. En règle générale, la partie gagnante recevra une ordonnance de dépens à la charge de la partie qui n'a pas eu gain de cause, mais tous dépens demeurent à la discrétion du tribunal.

Le tarif A des *Règles de la Cour du Banc de la Reine* indique les montants des dépens partie-partie, lesquels sont presque toujours beaucoup moins élevés que la somme réelle des frais engagés. De plus, les *Règles* prévoient la possibilité d'adjuger le double des montants prévus (ou d'adjuger des dépens à une partie qui autrement n'a pas eu gain de cause) dans des situations où une partie a fait une offre de règlement plus généreuse que le montant de l'ordonnance du tribunal.

Le tarif A divise l'ensemble des procédures en quatre catégories (I, II, III et IV). Le montant déterminé en vertu du tarif est généralement celui qui est adjugé, ainsi que des montants forfaitaires pour chacune des étapes de l'instance. Le montant adjugé relatif à chacune des étapes varie selon le montant de la demande en instance. Ces montants sont restés pratiquement les mêmes depuis 1989. Lorsque l'objet de la demande n'est pas une somme d'argent, le tribunal peut adjuger des dépens selon la catégorie qui lui semble appropriée.

Bien qu'il n'y ait pas de données précises sur la proportion des frais réels habituellement remboursée par les dépens adjugés en vertu du tarif, on estime qu'elle est inférieure à 50 %, qu'elle ne dépasse pas 25 % et qu'elle est même parfois inférieure à 10 % des frais réels.

Les *Règles* n'ont pas pour but de définir l'adjudication des dépens sur une base procureur-client, qui veut essentiellement qu'une partie paie approximativement le montant réel des frais engagés par l'autre partie. Habituellement, ce genre d'adjudication n'a lieu que dans des circonstances rares et exceptionnelles, comme dans une ordonnance visant à condamner la conduite scandaleuse d'une partie.

Dans le passé, on n'accordait aucuns dépens aux personnes qui se représentaient elles-mêmes devant le tribunal et qui gagnaient leur cause, mis à part les débours réellement engagés. Cette règle a été portée devant les tribunaux d'appel de plusieurs ressorts canadiens au cours des dernières années et ne s'applique plus. Au Manitoba, la loi n'a toutefois pas été modifiée à cet effet.

D. AUTRES RESSORTS

La Commission a examiné les règles sur les dépens en Ontario, en Colombie-Britannique, au Nouveau-Brunswick et en Nouvelle-Écosse. Les tribunaux de l'Ontario et de la Colombie-Britannique ont entrepris au cours des dernières années des réformes importantes de leur régime de dépens. Les modifications apportées ont été plutôt controversées et se poursuivent, à la suite de critiques des plus vigoureuses. Les réformes n'ont cependant pas remplacé le principe fondamental du « perdant payeur ». Le Nouveau-Brunswick et, par la suite, la Nouvelle-Écosse, ont adopté un régime de dépens qui diffère grandement sous certains aspects de ceux des autres provinces canadiennes étudiées, mais qui repose toujours sur le principe voulant que le perdant paie.

La Commission a également observé des exemples de ce qui se fait dans d'autres pays, particulièrement là où des réformes ont été entreprises ou envisagées dans les dernières années. L'Angleterre a procédé à une révision radicale de ses règles sur les dépens, dont les principes ressemblent à ceux du système canadien, afin de pénaliser les parties qui engagent des frais injustifiés ou excessifs dans leurs poursuites en justice. Des points instructifs ressortent également des règles sur les dépens dans les instances civiles en Australie et en Nouvelle-Zélande. Enfin, l'Allemagne est un exemple d'État de droit civil qui possède le système de perdant payeur le plus complet des ressorts de *common law*.

Bien que le principe du perdant payeur puisse sembler juste et incontestable aux avocats formés au Canada, il est loin d'être le seul envisagé comme tel. Nos voisins du sud, les États-Unis, partent du principe que le transfert des frais, selon leur façon d'appeler l'adjudication des dépens, ne devrait avoir lieu que dans des circonstances exceptionnelles, et la règle veut normalement que chacune des parties assume ses frais.

E. PROPOSITIONS DE RÉFORMES

Il est évident que les règles manitobaines sur les dépens ne permettent pas adéquatement d'atteindre les six objectifs prioritaires définis par la Commission.

En matière d'*indemnisation*, il semble clair que le tarif actuel ne suffit pas à assumer les frais réels des parties gagnantes. La Commission estime également qu'une réforme est nécessaire pour que les règles sur les dépens *dissuadent* davantage les poursuites et les défenses frivoles, ainsi que les étapes abusives ou inutiles au cours d'une instance. Aider les parties à saisir les frais réels d'une instance pourra augmenter l'effet de dissuasion et *favoriser un règlement*, un objectif que les présentes règles ne permettent pas toujours d'atteindre.

Par ailleurs, la Commission considère que les règles actuelles sur les dépens sont plutôt

faciles à comprendre et à appliquer, ce qui constitue, en fait, une de leurs plus grandes qualités et une caractéristique à conserver. De plus, la Commission juge que les règles sur les dépens n'entravent pas de manière inappropriée l'accès à la justice. À ce sujet, la Commission souligne que les règles sur les dépens ne sont jamais qu'une partie de la solution au problème d'accès à la justice et doivent être vues comme un complément aux contrôles des procédures, au système de gestion des causes et à d'autres initiatives.

Les juges de la Cour du Banc de la Reine disposent d'une souplesse adéquate dans le système actuel. La Commission est d'avis que leur souplesse n'a pas à être augmentée ou réduite de façon significative, bien qu'elle estime que le cadre dans laquelle elle est exercée a pour sa part *besoin* d'une réforme.

Recommandations

La Commission s'est d'abord penchée une question préliminaire, à savoir s'il y avait lieu de changer le fondement du régime de dépens actuel, c'est-à-dire, le principe voulant qu'une partie gagnante ait droit à ce qu'une part, mais non pas la totalité, de ses dépenses (y compris des frais juridiques) soit assumée par la ou les parties qui n'ont pas obtenu gain de cause. Tout compte fait, la Commission ne voit pas la nécessité de changer cette règle par défaut.

La deuxième question fondamentale pour la Commission était de déterminer la proportion de frais juridiques à adjuger en vertu des règles sur les dépens. La solution de rechange au système de tarif est d'adjuger les dépens en fonction des frais réels engagés par la partie gagnante, comme c'est le cas en Ontario, en Angleterre et aux États-Unis. Bien que cette façon de faire accroisse l'exactitude du niveau d'indemnisation dans certains cas particuliers, la Commission estime que le prix à payer serait trop grand, puisqu'un tel système ne présente pas la simplicité et la clarté d'un système de tarif. D'après l'expérience de l'Angleterre et de l'Ontario, il est clair que le Manitoba pourrait s'attendre à une hausse des litiges au sujet des dépens et à des demandes considérables compte tenu des ressources judiciaires limitées.

Attendu que l'indemnisation ne sera pas totale, quel niveau conviendrait-il? Le pourcentage d'indemnisation varie en fonction des ressorts, allant de seulement 30 % au pourcentage élevé de 90 % des dépenses réelles engagées. La Commission considère qu'une indemnisation d'environ 60 % des frais justifiés est adéquate et appropriée.

Après avoir examiné la structure du système de tarif, la Commission a conclu que le nombre de catégories devrait passer de quatre à six et que les catégories devraient se fonder sur l'importance et la difficulté relatives des causes plutôt que simplement sur la somme d'argent demandée. Afin de réduire l'ambiguïté que cette modification pourrait introduire, la Commission recommande que les causes soient classées dans une des catégories lors d'une des premières étapes, soit sur entente des parties ou, à défaut d'une entente, par le tribunal.

La probabilité que le tribunal adjuge des dépens inappropriés pourrait être réduite par

l'adoption d'une des récentes réformes de l'Ontario : exiger que les parties exposent leurs frais devant le tribunal *avant* de savoir quelle est la partie gagnante.

Les règles actuelles permettent aux juges d'adjuger des dépens sur des demandes interlocutoires payables immédiatement, mais, dans la pratique, de telles ordonnances sont rares. La Commission recommande que ces ordonnances deviennent une norme afin de favoriser davantage les règlements et de décourager les requêtes interlocutoires frivoles ou non fondées.

On a considéré traditionnellement comme un principe important que les parties ne devaient pas être « surindemnisées ». Cela signifie que l'adjudication des dépens (sauf dans de rares situations) ne devait pas dépasser les frais réels engagés par la partie gagnante. Toutefois, au cours des vingt dernières années, les tribunaux ont reconnu que les dépens remplissent diverses fonctions, et les restrictions quant à la surindemnisation sont désormais moins rigoureuses. La Commission distingue deux situations particulières pour lesquelles les restrictions ne devraient pas s'appliquer.

La première situation est celle où les parties se représentent elles-mêmes devant le tribunal, une situation de plus en plus courante. Dans le passé, ces parties n'avaient droit à aucune adjudication de dépens, puisqu'elles n'avaient engagé, par définition, aucuns frais d'avocats. Les tribunaux d'autres provinces ont adjugé des dépens à des parties qui se sont représentées elles-mêmes, et la Commission recommande que leur droit à des dépens soit expressément énoncé dans les *Règles* du Manitoba.

La deuxième situation où la question de la surindemnisation a été soulevée est celle des causes *pro bono*, soit lorsqu'un avocat représente gratuitement un client. La Commission recommande que la *Loi sur la Cour du Banc de la Reine* soit modifiée afin de préciser qu'une partie ne perd pas son droit à des dépens pour la seule raison que son avocat la représente gratuitement.

Par ailleurs, un des désavantages importants de l'utilisation d'un système de tarif pour fixer le montant des dépens à adjuger est le fait qu'il risque de s'éloigner du coût réel d'une instance. Pour que le tarif révisé reste à jour, la Commission recommande que le Comité des règles soit tenu de présenter chaque année au ministre de la Justice un rapport sur la nécessité de réviser les montants du tarif.

Enfin, la Commission s'est également penchée sur les dépens procureur-client, adjugés par le tribunal pour marquer sa désapprobation de toute conduite répréhensible, scandaleuse ou outrageante au cours de l'instance. La Commission ne voit pas la nécessité de codifier la compétence d'adjuger de tels dépens, puisqu'elle est indéniable, et n'estime pas nécessaire de codifier les motifs pour lesquels ils peuvent être adjugés. Elle estime cependant justifié de préciser la fixation de tels dépens en spécifiant qu'ils devraient simplement correspondre au double du montant du tarif applicable. Dans ce genre de situation, il serait légitime que l'objectif de réprimander ce type de conduite prime sur celui d'éviter la surindemnisation.